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Supreme Court, U.S.
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No. 03-10198

In the Supreme Court of the United States

Antonio Dwayne HALBERT,

Petitioner,

v

State of MICHIGAN,

Respondent.

On Petition for Writ of Certiorari
to the 10th Judicial Circuit Court, Saginaw County, Michigan

BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

The Michigan Constitution provides that a criminal defendant who pleads guilty or nolo contendere shall not have an appeal of right and shall have a right to appointed appellate counsel "as provided by law." A Michigan statute provides, with significant listed exceptions, that a criminal defendant who pleads guilty or nolo contendere shall not have appointed appellate counsel for discretionary appeals for review of the defendant's conviction or sentence. Petitioner was represented by retained counsel at trial, was convicted on his pleas, and was sentenced according to the Michigan Sentencing Guidelines. Petitioner's requests for appointed counsel to help prepare an application for leave to appeal were denied by the trial court.

I. Does the Fourteenth Amendment guarantee a right to an appointed appellate attorney to help prepare an application for leave to appeal in a discretionary first appeal by an indigent criminal defendant convicted by a guilty plea?

II. Was Petitioner deprived of the right to the effective assistance of counsel when retained trial counsel did not object to the scoring of Prior Record Variables and Offense Variables in determining the proper minimum sentence range under the Michigan Sentencing Guidelines?

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OPINIONS BELOW

Petitioner was convicted on November 7, 2001, and sentenced on December 10, 2001, in the Saginaw, Michigan Circuit Court on his pleas of nolo contendere to two charges of criminal sexual conduct in the second degree, MCL 750.520c. A copy of the plea transcript is attached as Respondent's Appendix 18b. The sentencing transcript is attached as Resp. App. 57b. In docket No. 00-019193 he pleaded to the charge of CSC II, with the victim being a person under 13 years of age, MCL 750.520c(1)(a). He was sentenced to a term of 24 months to 15 years imprisonment. In docket No. 01-020597, he pleaded to the charge of CSC II, with the victim being a person between 13 and 16 years of age and related to the defendant, MCL 750.520c(1)(b)(ii). He was sentenced to a term of 57 months to 15 years, consecutive to the sentence in No. 00-019193. Unreported Judgments of Sentence, Resp. App. 1b, 2b.

In an unreported order entered in both docket numbers on December 18, 2001, the trial court denied Petitioner's motion to withdraw his plea. Resp. App. 64b. In unreported orders entered in the two dockets on December 21, 2001, the trial court denied Petitioner's request for appointed counsel to assist him in filing an application for leave to appeal his convictions. Resp. App. 3b, 7b. In a subsequent unreported order entered with both docket numbers on October 25, 2002, the trial court again denied a motion for appointed appellate counsel. Resp. App. 11b.

In an unreported order entered January 13, 2003, the Michigan Court of Appeals denied Petitioner's delayed pro se application for leave to appeal, "for lack of merit in the grounds presented." Resp. App. 12b.

In an unreported order entered September 19, 2003, the Michigan Supreme Court denied Petitioner's pro se application for leave to appeal. Resp. App. 13b.

JURISDICTION

Petitioner was convicted on his pleas of nolo contendere in the Saginaw County, Michigan, Circuit Court on November 7, 2001. The Michigan Court of Appeals denied his discretionary delayed application for leave to appeal on January 13, 2003. The Michigan Supreme Court denied his discretionary application for leave to appeal on September 19, 2003. The petition for writ of certiorari was filed within 90 days of that date, on November 20, 2003.

This Court's jurisdiction is based on 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, and COURT RULES INVOLVED

Federal:

US Const., Amend. 14, § 1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan:

Michigan Constitution of 1963:
Mich Const 1963, art 1, § 20:
In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

Michigan Compiled Laws
MCL 770.3a Defendant pleading guilty, guilty but mentally ill, or nolo contendere; appointment of appellate counsel.
(1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
(2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
(a) The prosecuting attorney seeks leave to appeal.
(b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
(c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
(d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.
(3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:
(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.
(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

MCL 750.520c (in pertinent part):
(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
(a) That other person is under 13 years of age.
(b) That other person is at least 13 but less than 16 years of age and any of the following:
(i) The actor is a member of the same household as the victim.
(ii) The actor is related by blood or affinity to the fourth degree to the victim.
(iii) The actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.
(iv) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.
* * *
(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years.

Rule 7.203 Jurisdiction of the Court of Appeals
(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:
(1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(7), except a judgment or order of the circuit court
(a) on appeal from any other court or tribunal;
(b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;
An appeal from an order described in MCR 7.202(7)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right.
(2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule;
(B) Appeal by Leave. The court may grant leave to appeal from:
(1) a judgment or order of the circuit court, court of claims, and recorder's court which is not a final judgment appealable of right;
(2) a final judgment entered by the circuit court or the recorder's court on appeal from any other court;

(3) a final order of an administrative agency or tribunal which by law is appealable to or reviewable by the Court of Appeals or the Supreme Court;
(4) any other judgment or order appealable to the Court of Appeals by law or rule;
(5) any judgment or order when an appeal of right could have been taken but was not timely filed.

Rule 7.205 Application for Leave to Appeal (in pertinent part)

(A) Time Requirements. An application for leave to appeal must be filed within 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule.

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(1) 5 copies of an application for leave to appeal (one signed), stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; setting forth a concise argument, conforming to MCR 7.212(C), in support of the appellant's position on each issue; and, if the order appealed from is interlocutory, setting forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal;
(2) 5 copies of the judgment or order appealed from, of the calendar or docket entries, of the opinion or findings of the lower court, tribunal or agency, and of any opinion or findings reviewed by the lower court, tribunal or agency;
(3) if the appeal is from an administrative tribunal or agency, or from a circuit court on review of an administrative tribunal or agency, evidence that the tribunal or agency has been requested to send its record to the Court of Appeals;
(4) 1 copy of certain transcripts, as follows:

(a) in an appeal relating to the evidence presented at an evidentiary hearing in a civil or criminal case, the transcript of the evidentiary hearing, including the opinion or findings of the court which conducted the hearing;
(b) in an appeal from the circuit court or recorder's court after an appeal from another court, the transcript of proceedings in the court reviewed by the circuit court or recorder's court;
(c) in an appeal challenging jury instructions, the transcript of the entire charge to the jury;
(d) in an appeal from a judgment in a criminal case entered pursuant to a plea of guilty or nolo contendere, the transcripts of the plea and sentence;
(e) in an appeal from an order granting or denying a new trial, such portion of the transcript of the trial as, in relation to the issues raised, permits the court to determine whether the trial court's decision on the motion was for a legally recognized reason and based on arguable support in the record;
(f) in an appeal raising a sentencing issue, the transcript of the sentencing proceeding and the transcript of any hearing on a motion relating to sentencing;
(g) in an appeal raising any other issue, such portion of the transcript as substantiates the existence of the issue, objections or lack thereof, arguments of counsel, and any comment or ruling of the trial judge.

If the transcript is not yet available, or if there is no record to be transcribed, the appellant shall file a copy of the certificate of the court reporter or recorder or a statement by the

appellant's attorney as provided in MCR 7.204(C)(2). The appellant must file the transcript with the Court of Appeals as soon as it is available.
(5) if the appeal is from a probate court order, 5 copies of the probate court's certification of the issue, as required by law;
(6) proof that a copy of the filed documents was served on all other parties; and
(7) the entry fee.

(C) Answer. Any other party in the case may file with the clerk, within 21 days of service of the application,

(1) 5 copies of an answer to the application (one signed) conforming to MCR 7.212(D), except that transcript page references are not required unless a transcript has been filed; and
(2) proof that a copy was served on the appellant and any other appellee.

(D) Decision.

(1) There is no oral argument. The application is decided on the documents filed and, in an appeal from an administrative tribunal or agency, the certified record.
(2) The court may grant or deny the application; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed. The clerk shall enter the court's order and mail copies to the parties.
(3) If an application is granted, the case proceeds as an appeal of right, except that the filing of a claim of appeal is not required and the time limits for the filing of a cross appeal and for the taking of the other steps in the appeal, including the filing of the docketing statement (28 days), and the filing of the court reporter's or recorder's certificate if the transcript has not been filed (14 days), run from the date the order granting leave is certified.
(4) Unless otherwise ordered, the appeal is limited to the issues raised in the application and supporting brief.

(E) Emergency Appeal.

(1) If the order appealed requires acts or will have consequences within 56 days of the date the application is filed, appellant shall alert the clerk of that fact by prominent notice on the cover sheet or first page of the application, including the date by which action is required.
(2) When an appellant requires a hearing on an application in less than 21 days, the appellant shall file and serve a motion for immediate consideration, concisely stating facts showing why an immediate hearing is required. A notice of hearing of the application and motion or a transcript is not required. An answer may be filed within the time the court directs. If a copy of the application and of the motion for immediate consideration are personally served under MCR 2.107(C)(1) or (2), the application may be submitted to the court immediately on filing. If mail service is used, it may not be submitted until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(F) Late Appeal.

(1) When an appeal of right or an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the

claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(3) Except as provided in subrule (F)(4), leave to appeal may not be granted if an application for leave to appeal is filed more than 12 months after the later of:

(a) entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the 12 months are counted from the time of entry of the order denying that motion; or

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period, then the 12 months are counted from the entry of the order denying the motion.

* * *

STATEMENT OF THE CASE

A. Facts and Procedural History.

Petitioner was arrested and charged in a felony information in the Saginaw County, Michigan, Circuit Court with three counts of Criminal Sexual Conduct in the Second Degree with three different victims in two different locations on three different dates between April and June 2000. Docket No. 00-019193, Resp. App. 14b, 15b, 16b. Count I alleged violation of MCL 750.520c(1)(a), criminal sexual conduct with a person under 13 years of age (a 10-year-old female). Count II alleged violation of MCL 750.520c(1)(b), criminal sexual conduct with a victim at least 13 but less than 16 years old, with the victim being a member of Petitioner's household (Petitioner's 13-year-old stepdaughter). Count III alleged violation of MCL 750.520c(1)(a), criminal sexual conduct with a person under 13 years of age (a six-year-old female). Petitioner was released on bond in December 2000, one of the conditions of which was that he not reside at the residence of the victim in Count II, his stepdaughter.

Approximately seven months after his release on bond, he was arrested in July 2001 and charged in a felony information in the Saginaw County, Michigan, Circuit Court with one count of Criminal Sexual Conduct in the Second Degree, MCL 750.520c(1)(b), criminal sexual conduct with a victim at least 13 but less than 16 years old, and being related to the victim (a new offense against Petitioner's then 14-year-old stepdaughter, the same victim as in Count II of the earlier charge). Docket No. 01-020597, Resp. App. 17b.

Petitioner remained in custody and was represented by retained counsel throughout the trial court proceedings on all offenses.

In a proceeding in the Saginaw County Circuit Court on November 7, 2001, Petitioner entered pleas of nolo contendere to Count I in Docket No. 00-019193 and the sole count in

Docket No. 01-020597.[1] In exchange, the prosecution agreed to dismiss Counts II and III of Docket No. 00-019193 and recommend that Petitioner be sentenced within the Michigan Sentencing Guidelines. The prosecution also requested consecutive sentencing.[2] Petitioner requested concurrent sentencing. The trial court engaged in a colloquy with Petitioner, under oath, as required by Court Rule, MCR 6.302, to ascertain that the pleas were "understanding, voluntary, and accurate." The plea transcript is attached as Resp. App. 18b. The court informed Petitioner of the many rights he would be giving up by pleading instead of going to trial, including the right to appeal and the right to appointed appellate counsel, plea transcript, pp 7-8:

> THE COURT: You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right.
>
> THE DEFENDANT: Yes, sir.
>
> * * *
>
> THE COURT: You understand if I accept your plea and you are financially unable to retain a lawyer to represent you on appeal, the Court must appoint an attorney for you if the sentence I impose exceeds the sentencing guidelines or you seek leave to appeal a conditional plea or the prosecutor seeks leave to appeal or the Court of Appeals or Supreme Court grants you leave to appeal. Under those condition I must appoint an attorney, do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Further, if you are financially unable to retain a lawyer to represent you on appeal, the Court may appoint an attorney for you if you allege an improper scoring of the sentencing guideline, you object to the scoring at the time of the sentencing and the sentence I impose exceeds the sentencing guidelines as you allege it should be scored. Under those conditions I may appoint an attorney for you, do you understand that?
>
> THE DEFENDANT: yes, sir. [Resp. App. 24b-25b.]

The Court also reiterated that the prosecution was recommending consecutive sentencing and defendant's counsel was recommending concurrent sentencing but that the Court had not agreed on a possible sentence. Petitioner, his counsel, and the prosecutor agreed that the Court had stated the complete terms of the plea and that there were no other promises. Sentencing transcript, pp 8-10; Resp. App. 25b -26b. The Court then accepted the pleas and referred the case to the Michigan Department of Corrections for a presentence investigation report, MCL 771.14.

Under Michigan's indeterminate sentencing framework, the maximum sentences are set by statute and the minimum sentence ranges are determined by using the Michigan Sentencing Guidelines.[3] The presentencing investigation report included a Sentencing Information Report (Petitioner's Appendix I and J) for each offense prepared according to the Guidelines. Excerpts from the Michigan Sentencing Guidelines Manual, 2001 Edition are attached at Resp. App. 29b. The two crimes to which Petitioner pleaded, Criminal Sexual Conduct in the Second Degree, each have a statutory maximum penalty of 15 years imprisonment. MCL 750.520c(2). For purposes of the establishing the minimum sentence under the Guidelines, these crimes are classified as Class C Crimes Against a Person. Prior Record Variables (PRV) and Offense Variables (OV) are evaluated for each offense and assigned numerical values. These numerical values are then compared against a grid, Resp. App. 56b, to determine the minimum sentence range. For Docket No.00-019193, the total PRV was zero, and the total OV was 45 (OV 9,

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[1] Petitioner entered pleas of nolo contendere rather than guilty because of the potential for civil liability in an ongoing neglect petition concerning the victim-stepdaughter. Plea transcript, p 3; Resp. App. 20b.

[2] Because the second offense was committed while the first charges were pending, the trial court had discretion to impose consecutive, rather than concurrent, sentencing. MCL 768.7b(2):

> (2) Beginning January 1, 1992, if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony, upon conviction of the subsequent offense or acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to the subsequent offense, the following shall apply:
> (a) Unless the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charged offense and the subsequent offense may run consecutively.

[3] Sentencing guidelines are governed by statute, MCL 777.1 *et seq*. The Michigan Supreme Court has promulgated a Michigan Sentencing Guidelines Manual, the current version of which can be found on the Michigan Courts Web site. http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm.

"Number of Victims" (three) = 10 points; OV 10, "Exploitation of a Vulnerable Victim" (youth) = 10 points; OV 13, "Continuing Pattern of Criminal Behavior" (three or more crimes against a person) = 25 points). Application of these values to the grid for this Crime Class yielded a Guideline Minimum Range of 12 to 24 months. For Docket No. 01-020597, the total PRV was 20 (PRV 6, "Relationship to the Criminal Justice System" (offender on bond awaiting adjudication or sentencing for a felony) = 10 points; PRV 7, "Subsequent or Concurrent Felony Convictions" (offender has one subsequent or concurrent conviction) = 10 points). The total OV value was 45 (OV 4 "Psychological Injury to a Victim" (serious psychological injury) = 10; OV 10, "Exploitation of a Vulnerable Victim" (youth) = 10 points; OV 13, "Continuing Pattern of Criminal Behavior" (three or more crimes against a person) = 25 points). Application of these values to the grid for this Crime Class yielded a Guideline Minimum Range of 29 to 57 months.

At the sentencing hearing on December 10, 2001, Petitioner was still represented by his retained counsel. The transcript of the sentencing hearing is attached at Resp. App. 57b. The Court inquired of Petitioner and his counsel whether they had reviewed the Presentence Investigation Report prepared by a Department of Corrections employee named Deborah Hall, which included the sentence guidelines determinations, Sentencing Transcript pp 2-3; Resp. App. 58b-59b:

> THE COURT: Have you had a chance to talk to the Department of Corrections about what happened here?
>
> THE DEFENDANT: Have I had a chance to talk with them?
>
> THE COURT: Did you talk to Miss Hall?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Did you review her report?
>
> THE DEFENDANT: Yes, sir.

> THE COURT: Is there anything inaccurate in the report?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Counsel have a chance to review the report?
>
> MR. O'FARRELL: Yes, your Honor. Rod O'Farrell on behalf of Mr. Halbert. I read through it with him at the end of last week. It is accurate. We have no additions or corrections.
>
> THE COURT: Anything in addition to the report?
>
> MR. O'FARRELL: No, your Honor, not at this time.

The Court then heard a statement by Petitioner's counsel asking for concurrent rather than consecutive sentencing, a victim impact statement from the father of one of the child victims, and a statement from Petitioner. The Court then imposed consecutive sentences within the guidelines, of 24 months to 15 years and 57 months to 15 years. Resp. App. 61b, 1b, 2b. Petitioner was given, and then signed and filed, a form entitled "Notice of Rights After Sentencing (after Plea of Guilty/Nolo Contendere) and Request for Appointment of Attorney." Resp. App. 3b, 7b.

In an unreported order entered in both docket numbers on December 18, 2001, the trial court denied Petitioner's motion to withdraw his plea. Resp. App. 64b. In unreported orders entered in the two dockets on December 21, 2001, the trial court denied Petitioner's request for appointed counsel to assist him in filing an application for leave to appeal his convictions. Resp. App. 3b, 7b. Petitioner filed a motion for appointment of counsel, an evidentiary hearing, and resentencing on September 11, 2002. Resp. App. 65b. In an unreported order entered with both docket numbers on October 25, 2002, the trial court again denied a motion for appointed appellate counsel. Resp. App. 11b.

Petitioner filed a pro se application for leave to appeal to the Michigan Court of Appeals on November 5, 2002, on a form provided by the State Court Administrative Office. Copy (without attachments) attached at Resp. App. 70b. That application challenged the scoring of the sentencing guidelines and alleged ineffective assistance of trial counsel, and included a copy of the motion filed in the trial court on September 11, 2002, that referred to an alleged right to appointed appellate counsel. The prosecutor did not file a response. In an unreported order entered January 13, 2003, the Michigan Court of Appeals denied Petitioner's delayed pro se application for leave to appeal, "for lack of merit in the grounds presented." Resp. App. 12b.

Petitioner filed a pro se application for leave to appeal to the Michigan Supreme Court on a form provided by Prison Legal Services of Michigan. A copy (without Petitioner's attachments) is attached at Resp. App. 74b. That application challenged the scoring of the sentencing guidelines, alleged ineffective assistance of trial counsel, and raised for the first time as "New Issue I" of entitlement to appointed appellate counsel. The prosecutor did not file a response. In an unreported order entered September 19, 2003, the Michigan Supreme Court denied Petitioner's pro se application for leave to appeal. Resp. App. 13b.

B. The Michigan Framework For Appeals From Guilty Pleas.

The Michigan Constitution provides that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." Mich Const 1963, art I, § 20. The Michigan statute challenged in this petition, MCL 770.3a provides, with significant listed exceptions, that criminal defendants who plead guilty, guilty but mentally ill, or nolo contendere shall not have appointed appellate counsel for these discretionary appeals of the convictions or sentences.[4]

[4] MCL 770.3a applies to appeals from convictions based on pleas of guilty, guilty but mentally ill, and nolo contendere. For convenience, this Brief uses the term "guilty plea" to apply to all three types of convictions.

Michigan has a two-tier appellate court system consisting of the intermediate Court of Appeals and the Michigan Supreme Court. The Michigan Court of Appeals has jurisdiction of appeals of right from most final judgments or final orders of the circuit courts.[5] MCR 7.203(A). Some appeals, including criminal cases like the present one in which the conviction is based on a guilty plea, are discretionary, by leave granted. Mich Const 1963, art 1, § 20; MCL 600.308(2)(d), 770.3(1)(d); MCR 7.203(B). All appeals to the Michigan Supreme Court are discretionary, by leave granted. MCL 770.3(6); MCR 7.301.

The requirements for filing an application for leave to appeal to the Michigan Court of Appeals in discretionary appeals like the present one are set forth in the court rules. MCR 7.205. That Court may grant or deny the application; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed.

The Michigan Supreme Court has described in detail the history of the framework for appeals from guilty pleas in Michigan. *People v Bulger*, 462 Mich 495, 503-506; 614 NW2d 103 (2000) *cert denied*, 531 US 994 (2000)(holding that neither the Michigan Constitution nor the United States Constitution requires the appointment of appellate counsel at public expense when a criminal defendant applies for leave to appeal a plea-based conviction).

The challenged statute, MCL 770.3a, became effective April 1, 2000.[6] It provides that "a defendant who pleads guilty . . . shall not have appellate counsel appointed for review of the

[5] The circuit courts are the trial courts of general jurisdiction, including jurisdiction over felonies and appellate jurisdiction over lower courts. Mich Const 1963, art VI, § 13; MCL 600.601.

[6] Because MCL 770.3a did not apply to the defendant in *Bulger*, the precise question of its constitutionality was not before the Michigan Supreme Court, but the Court explicitly upheld the constitutionality of the practice of denying appointed counsel. In *People v Harris*, 470 Mich. 882; 681 NW 2d 653 (2004) the Court relied on *Bulger* and declared MCL 770.3a constitutional.

defendant's conviction or sentence." MCL 770.3a(1). Four exceptions specify that appellate counsel must be appointed when the prosecution seeks leave to appeal; when the defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines; when the appellate court grants the defendant's application for leave; and when the defendant seeks leave to appeal a conditional plea. MCL 770.3a(2). Additionally, appellate counsel may be appointed in one other circumstance when three factors are present: the defendant seeks leave to appeal a sentence based upon allegedly improper scoring of offense or prior record variables; the defendant preserved an objection to the scoring; and the sentence constitutes an upward departure from the upper limit of the minimum sentence range. MCL 770.3a(3).

REASONS FOR DENYING THE PETITION

The petition raises two issues, neither of which warrants certiorari. The first is an allegation that petitioner has a federal constitutional right to appointed appellate counsel to help prepare an application for leave to appeal for a discretionary appeal to the Michigan Court of Appeals from his pleas of nolo contendere. Although this is an important issue, this Court need not grant certiorari to review it, because it was correctly decided by the Michigan trial court and the Michigan appellate courts denied leave to appeal without ruling on it, and because the issue is already pending in another case. The United States Court of Appeals for the Sixth Circuit held, contrary to the Michigan Supreme Court in *Bulger*, *supra*, 462 Mich 495 and *Harris*, *supra*, 470 Mich 882, that MCL 770.3a was unconstitutional. *Tesmer v Kowalski*, 333 F 3d 683 (6th Cir., 2003). This Court granted the State's petition for certiorari in that case and the issue is now pending in *Kowalski v Tesmer*, No. 03-407 (oral argument scheduled for October 4, 2004).

The second issue raised in the petition is whether petitioner received the effective assistance of counsel from his retained counsel in the trial court. This Court should not grant certiorari on this issue because it presents no important question of federal law and there is no conflict with other decisions. It is exclusively dependent on the unique facts of this case, the claim is without merit, it was correctly decided by the trial court, and the Michigan appellate courts denied leave to appeal without considering the merits of the issue.

I. There Is No Constitutional Right To Appointed Counsel In Discretionary Appeals From Guilty Plea Convictions.

Although there is no constitutional right to an appeal, *McKane v Durston*, 153 US 684 (1894), this Court has held that if a State grants a right to a first appeal on the merits, then it

generally cannot deny appointed counsel to an indigent. *Douglas v California*, 372 US 353, 357 (1963)("where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor" (emphasis in original)).

By contrast, this Court has also held that after an initial first appeal by right to an intermediate State court of appeals, the Constitution does not require appointment of appellate counsel for a subsequent discretionary appeal to a State supreme court. *Ross v Moffitt*, 417 US 600, 610, 612 (1974). A discretionary appeal from a guilty plea conviction in Michigan, in all relevant respects, more closely resembles *Moffitt* than *Douglas*. Accordingly, MCL 770.3a is constitutional.

The Sixth Amendment right to counsel applies to criminal prosecutions, not appeals, so the right to an attorney on appeal has been analyzed under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and not the Sixth Amendment.[7] *Ross v Moffitt, supra*, 417 US at 608-609 ("The precise rationale for the *Griffin*[*v Illinois*, 351 US 12 (1956)] and *Douglas* lines of cases has never been explicitly stated. some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."); *Smith v Robbins, supra*, 528 US at 276 ("But our case law reveals that, as a practical matter, the two clauses largely converge to require that a State's procedure "afford adequate and effective appellate review to indigent defendants," *Griffin*, 351 US at 20 (plurality opinion).").

[7] US Const, Amend XIV: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Ross v Moffitt* this Court described the framework for analyzing whether an indigent criminal defendant has a constitutional right to appellate counsel, 417 US at 612, 616:

> The Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions. It does require that the state appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system.
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> * * *
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> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. [Citations and internal quotation marks omitted.]

The Michigan appellate system makes a distinction between appeals from convictions based on trials, which are by right, and appeals from convictions based on guilty pleas, which are discretionary. Because this distinction is based on legitimate and permissible differences between trials and guilty pleas, the Michigan appellate system is "free of unreasoned distinctions." Furthermore, because of protections built into the guilty plea system, petitioner Halbert had "an adequate opportunity to present [his] claims fairly" and receive a meaningful appeal without appointed appellate counsel.

A. There Are Reasoned Distinctions Between Appeals From Convictions After Trials And Appeals From Guilty Plea Convictions

Convictions by guilty pleas are advantageous to both defendants and the government, and are a major aspect of the criminal justice system. *Brady v United States*, 397 US 742, 752 (1970) (describing advantages and noting that "well over three-fourths of the criminal convictions in this country rest on pleas of guilty"). In *Tollett v Henderson*, 411 US 258, 267 (1973) this Court recognized unique aspects of guilty pleas:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that

> he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

In Michigan, extensive protections are in place to assure that guilty pleas are voluntary, intelligent, and accurate. MCR 6.302. The purpose of these elaborate guilty plea procedures is to make sure the record reflects "'that the defendant was informed of such constitutional rights and incidents of a trial as reasonably to warrant the conclusion that he understood what a trial is and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial and such rights and incidents.'" *People v Saffold*, 465 Mich 268, 271; 631 NW2d 320 (2001) quoting *In re Guilty Plea Cases*, 395 Mich 122; 235 NW2d 132 (Mich 1975). In reversing a lower court determination that a guilty plea was not voluntary, this Court recently said: "The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances -- even though the defendant may not know the *specific detailed* consequences of invoking it." *United States v Ruiz*, 536 US 622, 629 (2002) (emphasis in original).

The Michigan court rule specifically requires that the trial court "speak[] directly to the defendant," the prosecutor, and the defendant's attorney to assure that the defendant is fully informed and fully understands that by pleading guilty he is giving up many rights, specifically including the right to appeal and the right to appointed counsel on any discretionary appeal. MCR 6.302(B)(5), (6). See *Iowa v Tovar*, 541 US ___; 124 S Ct 1379, 1383; 158 L Ed 2d 209, 215 (2004)(holding that the Sixth Amendment "is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea"). Petitioner Halbert was fully informed of the consequences of his pleas, including the fact that he was

giving up the right to appointed counsel on appeal, see Plea Transcript, Resp App. 24b - 25b. His pleas constitute a valid waiver of any right to appointed appellate counsel.

These distinctions between trials and guilty pleas are legitimate and permissible, and support Michigan's decision to treat the respective appeals differently.

B. Petitioner Had An Adequate Opportunity To Present His Claims Fairly And Receive A Meaningful Appeal.

In discretionary first appeals from guilty plea convictions in Michigan, the defendant will have sufficient materials available to permit him to present his claims fairly and thus receive a meaningful appeal. As an indigent criminal defendant, petitioner was entitled to, and received, free copies of court documents, including transcripts. MCR 6.433. The transcript , together with the "nontechnical and easily understood" form produced by the State Court Administrative Office as required by the statute, MCL 770.3a(4), permitted petitioner to present his claims in a "lawyerlike fashion" as contemplated by *Ross v Moffitt*, 417 US at 615, even without counsel. It is apparent that petitioner was aware of the then-ongoing federal litigation in *Tesmer v Kowalski*, as he cited the District Court and initial Court of Appeals panel decision in his Michigan applications for leave to appeal. Petitioner's claims were presented to the Michigan appellate courts sufficiently to enable them to determine whether to grant the discretionary leave to appeal. Although the Michigan Court of Appeals and Michigan Supreme Court were sufficiently apprised of the issues, both courts exercised their discretion and denied leave to appeal.

C. Orders Of The Michigan Court Of Appeals Denying Applications For Leave To Appeal Are Discretionary And Are Not Decisions On The Merits Of The Legal Issues.

Beginning at least with *Griffin v Illinois*, 351 US 12 (1956) (holding that when a transcript of trial court proceedings is necessary for full direct appellate court review of the

merits, the Constitution requires a State to provide the transcript to an indigent), and continuing through *Douglas v California, supra*, 372 US 353, and *Ross v Moffitt, supra*, 417 US 600, this Court has recognized a distinction between direct appellate review by right of the merits of legal issues, and discretionary appellate review, which involves evaluation of other factors. An indigent defendant is generally entitled to counsel in a first appeal by right on the merits because such an appeal is important to "a correct adjudication of guilt or innocence," and is "an integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant," *Griffin, supra*, 351 US at 18. Counsel is required "where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot," *Douglas, supra*, 372 US at 357, and where the appeal on the merits is "the final step in the adjudication of guilt or innocence of the individual," *Evitts v Lucey*, 469 US 387, 404 (1985) (holding that in a first appeal of right on the merits, defendants are entitled not just to counsel, but to the effective assistance of counsel).

In *Ross v Moffitt, supra*, 417 US at 615, this Court recognized that "the function served by discretionary review" is different from direct review of the merits, and involves different constitutional considerations. Counsel was not constitutionally required, in part because that discretionary appeal did not depend on whether a correct adjudication of guilt had been reached below. Rather, it was based on other factors like "whether 'the subject matter of the appeal has significant public interest,' whether 'the cause involves legal principles of major significance to the jurisprudence of the State,' or whether the decision below is in probable conflict with a decision of the [State] Supreme Court." 417 US at 615. The exercise of discretion by the Michigan Court of Appeals in deciding whether to grant leave to appeal is similar, even though

the court rules do not explicitly provide such criteria (unlike the criteria specified for applications to the Michigan Supreme Court, see MCR 7.302(B)).

Convictions on guilty pleas in Michigan are, in a very real sense, "the final step in the adjudication of guilt or innocence of the individual," *Evitts v Lucey*, 469 US at 404. Appeals from guilty pleas in Michigan—whether with or without counsel—are discretionary. In ruling on applications for leave to appeal, the Michigan Court of Appeals is typically not deciding the merits of the legal issues presented; it is only deciding whether the issues have sufficient merit to deserve substantive consideration. The Michigan Court of Appeals may grant or deny the application for leave to appeal; enter a final decision; grant other relief; request additional material from the record; or require a certified statement of proceedings and facts from the lower court. If an application is granted, counsel is appointed and the case proceeds as an appeal of right. MCR 7.205(D)(2), (3); MCL 770.3a(2)(c).

When the Michigan Court of Appeals enters an order denying leave to appeal it often uses the following boilerplate language: "The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented." This boilerplate language does not mean that the Michigan Court of Appeals is deciding the substantive merits of legal claims. It means no more than that the reasons presented to justify the grant of leave to appeal were insufficient to persuade the Court to exercise its discretion and accept the appeal. Well-established Michigan case law demonstrates that this language does not mean that the Michigan Court of Appeals reviewed the substantive merits of any particular issue.

Orders by both the Michigan Supreme Court and the Michigan Court of Appeals denying discretionary applications for leave to appeal are not decisions on the merits. In *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW 2d 901 (1953), the Michigan Supreme

Court quoted from *Malooly v York Heating & Ventilating Corp.*, 270 Mich 240, 247; 258 NW 622 (1935) and said: "The denial of an application for leave to appeal is ordinarily an act of judicial discretion equivalent to the denial of certiorari. It is held that the denial of the writ of certiorari is not equivalent of an affirmation of the decree sought to be reviewed. [Citations omitted]."

In *People v Berry*, 10 Mich App 469, 473-474; 157 NW 2d 310 (1968) the Michigan Court of Appeals cited and quoted *Peters*, *Malooly*, and another case, and held that it was not barred from reviewing the merits of an issue even though an application for leave to appeal had previously been denied:

> All three cases involved denials of applications for leave to appeal from interlocutory orders. However, the principle . . . is equally applicable to denials of applications for leave to appeal from final judgments. Such denials are acts of judicial discretion and do not constitute affirmances on the merits.
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> [D]enials of applications for leave to appeal do not import an expression of opinion on the merits of a cause, but rather are acts of judicial discretion. For this reason such denials cannot be afforded res judicata treatment. This Court is not barred from looking into the merits of the present cause. [Citations omitted.]

Even more conclusively, in *State ex rel Saginaw* Prosecuting *Attorney v Bobenal Invest, Inc*, 111 Mich App 16, 22 n 2; 314 NW 2d 512 (1981), *lv den* 414 Mich 951 (1982), the Michigan Court of Appeals held that two previous orders that denied applications for leave to appeal "for lack of merit in the grounds presented" were not adjudications on the merits.[8] Therefore the doctrines of res judicata and law of the case did not apply: "By denying the

[8] Defaults had been entered against two parties, and the trial court denied motions to set them aside. The parties appealed separately, and the applications for leave to appeal were denied by the Michigan Court of Appeals on April 4, 1980 (Mich App Docket No. 50540) and April 8, 1980 (Mich App Docket No. 50736). Both orders contained the form language: "IT IS FURTHER ORDERED that the application for leave appeal be, and the same is hereby DENIED for lack of merit in the grounds presented."

interlocutory applications for leave to appeal neither this Court, nor the Supreme Court, ruled on the merits of the challenges to the legal sufficiency of plaintiff's complaint."

In *People v Tooson*, (*In re Withdrawal of Attorney*), 231 Mich App 504, 505-506; 231 NW 2d 504 (1998), an appeal from a guilty plea, the Michigan Court of Appeals held that only the trial court, and not the Court of Appeals, had jurisdiction over an appointed appellate attorney's motion to withdraw based on lack of meritorious issues on appeal:

> When an application for leave to appeal is filed, this Court's jurisdiction is limited to granting an application, denying it, or awarding peremptory relief. MCR 7.205(D)(2), 7.215(A). Plenary jurisdiction attaches only after leave is granted. MCR 7.205(D)(3). Only if and when leave is granted does this Court actually possess plenary power over this class of cases.

Similarly, under the Michigan Court Rules, orders of the Michigan Court of Appeals denying leave to appeal do not fall within the criteria for publication, MCR 7.215(B); are not precedentially binding under the rule of *stare decisis*, MCR 7.215(C); are not even within the definition of "judgments" of the Court; and are "not deemed to dispose of an appeal" for purposes of execution, enforcement, and timing of subsequent events. MCR 7.215(E)(1).[9]

[9] MCR 7.215:
* * *
(B) Standards for Publication. A court opinion must be published if it:
(1) establishes a new rule of law;
(2) construes a provision of a constitution, statute, ordinance, or court rule;
(3) alters or modifies an existing rule of law or extends it to a new factual context;
(4) reaffirms a principle of law not applied in a recently reported decision;
(5) involves a legal issue of continuing public interest;
(6) criticizes existing law; or
(7) creates or resolves an apparent conflict of authority, whether or not the earlier opinion was reported; or
(8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.
(C) Precedent of Opinions.
(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. * * *
(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. * * *
* * *
(E) Judgment.

Federal habeas corpus courts have also considered the question of whether orders from the Michigan Court of Appeals denying leave to appeal are decisions on the merits of the legal issues. Federal habeas review of a State court's decision is governed by the standards established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub L No 104-132, 110 Stat 1214 (1996). Under the AEDPA, an application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was "adjudicated on the merits in State court proceedings" unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 USC § 2254(d).

In *McKenzie v Smith*, 326 F 3d 721, 727 (6th Cir., 2003), *cert denied*, 540 US ___; 124 S Ct 1145 (2004) the Court considered an order of the Michigan Court of Appeals denying an application for leave to appeal in the form language, "for lack of merit in the grounds presented" and said, "there are simply no results, let alone reasoning, to which this court can defer. Without such results or reasoning, any attempt to determine whether the state court decision 'was contrary to, or involved an unreasonable application of clearly established Federal law,' 28 USC § 2254(d)(1), would be futile." The Court therefore declined to apply any deference to the State court order and instead applied de novo review and granted relief, thus demonstrating that it did not consider the Michigan Court of Appeals form order to be a disposition on the merits.

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(1) When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment. An order denying leave to appeal is not deemed to dispose of an appeal.

Years earlier, in *Raper v Mintzes*, 706 F 2d 161, 164 (6th Cir., 1983), the Court considered the effect of an order denying leave to appeal "for lack of merit in the grounds presented" and said, "The order appears to be a standard form denial of leave to file a delayed appeal and gives no indication as to the basis for the decision. In this context, the state court's use of the word 'merit' in its order does not conclusively establish that the decision was based on the merits." *Contra, Abela v Martin*, ___ F 3d ___; 2004 U.S. App. LEXIS 18210 (6th Cir., 2004).

Michigan has chosen to address the burdens on its appellate court system, in part, by imposing limits on appeals from guilty pleas. It may constitutionally do so since its process provides "adequate and effective appellate review to indigent defendants." *Griffin v Illinois*, 351 US at 20. A State "may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." *Griffin*, 351 US at 24 (opinion of Justice Frankfurter, concurring in judgment). States are laboratories of federalism that are free, within the limits of the Constitution, to experiment with procedures for handling criminal appeals, *Smith v Robbins*, *supra*, 528 US at 276 ("We will not cavalierly 'impede the States' ability to serve as laboratories for testing solutions to novel legal problems'" (citation omitted.)).

The system Michigan has chosen for appeals from guilty pleas complies with the Constitution. Petitioner was able to present his issues effectively to the Michigan appellate courts, although those courts chose not to rule on them.

II. Petitioner Was Not Deprived Of The Effective Assistance Of Counsel When His Retained Trial Counsel Did Not Object To The Scoring Of "Prior Record Variables" And "Offense Variables" In Determining The Proper Minimum Sentence Range Under The Michigan Sentencing Guidelines.

Under Michigan's indeterminate sentencing framework, the maximum sentences are set by statute and the minimum sentence ranges are determined by using the Michigan Sentencing Guidelines. The presentencing investigation report included a Sentencing Information Report (Petitioner's Appendix I and J) for each offense prepared according to the Guidelines. Excerpts from the Michigan Sentencing Guidelines Manual, 2001 Edition are attached at Resp. App. 29b. The two crimes to which Petitioner pleaded, Criminal Sexual Conduct in the Second Degree, each have a statutory maximum penalty of 15 years imprisonment. MCL 750.520c(2). For purposes of the establishing the minimum sentence under the Guidelines, these crimes are classified as Class C Crimes Against a Person. Prior Record Variables (PRV) and Offense Variables (OV) are evaluated for each offense and assigned numerical values. These numerical values are then compared against a grid, Resp App. 56b, to determine the minimum sentence range.

In *People v Morson*, ___ Mich ___; 2004 Mich. LEXIS 1692 (2004) the Michigan Supreme Court described the operation of the sentencing guidelines:

> Generally, to determine a minimum sentence range under the legislative sentencing guidelines, the sentencing court must first determine the offense category. MCL 777.21(1)(a). The sentencing court must then determine which offense variables (OV) are applicable, score those variables, and total the points to determine the offender's offense variable level. *Id.* The sentencing court also scores all prior record variables. MCL 777.21(1)(b). The offender's offense variables score and prior record variables score are then used with the sentencing grids to determine the recommended minimum sentence range under the guidelines. MCL 777.21(1)(c).

Although petitioner and his counsel affirmed their agreement with the entire presentence report and sentencing guidelines recommended minimum sentences, Resp. App. 58b-59b, he now alleges that some variables were scored incorrectly in computing the minimum sentence ranges, and that his counsel's failure to object constituted ineffective assistance of counsel. In *Strickland v Washington*, 466 US 668, 687-694 (US, 1984) this Court held that in a claim of ineffective assistance of counsel two elements must be established, deficient performance and prejudice:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
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> * * *
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> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In *Glover v United States*, 531 US 198 (2001) this Court considered a claim of ineffective assistance of counsel in the failure to object to an error in a Federal Sentencing Guidelines determination (a determinate system of sentencing, unlike Michigan's indeterminate sentence guidelines for determining the range of the minimum sentence) that increased the defendant's prison sentence by at least 6 months and perhaps by 21 months. The Court held that such an error can satisfy the prejudice prong of the test, but might not satisfy the deficient performance prong, 531 US at 204:

> Although the amount by which a defendant's sentence is increased by a particular decision may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance, under a

determinate system of constrained discretion such as the Sentencing Guidelines it cannot serve as a bar to a showing of prejudice.

If Petitioner's sentence guidelines were scored incorrectly, and if he received a longer minimum sentence because of the error, his statutory maximum sentence would not be affected but his parole eligibility date might be affected. In Michigan, prisoners serving consecutive sentences become subject to the jurisdiction of the parole board at the expiration of their combined minimum terms. MCL 791.234 (4).[10]

Petitioner thus has made a claim that satisfies the prejudice prong of the test for ineffective assistance of counsel. Petitioner cannot satisfy the deficient performance prong, however, because any error in the scoring did not have any effect on the range of minimum sentences under the guidelines.

Docket No. 00-019193

For Docket No.00-019193, the total PRV was zero, and the total OV was 45 (OV 9, "Number of Victims" (three) = 10 points; OV 10, "Exploitation of a Vulnerable Victim" (youth) = 10 points; OV 13, "Continuing Pattern of Criminal Behavior" (three or more crimes against a person) = 25 points). Application of these values to the grid for this Crime Class yielded a Guideline Minimum Range of 12 to 24 months. Petitioner alleges that OV 9 and OV 13 were scored incorrectly. Respondent submits that OV 13 was scored correctly and although it appears that OV 9 may have been scored incorrectly, any error did not have any impact on the ultimate scoring for determining the minimum sentence range.

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[10] MCL 791.234(4):

If a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

OV 13 evaluates a continuing pattern of criminal behavior. MCL 777.43(1)(b) provides that 25 points shall be awarded if "The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(2)(a) provides instructions in scoring this variable, "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." See Sentencing guidelines manual, p 32, that mirrors this statutory language. Resp. App. 51b. Petitioner's allegation of error is that his nolo plea in this docket was only for a single victim, so he should not have received the points. The statute and guidelines use the phrase "crimes against a person" to define the offense category, MCL 777.5, and distinguish it from other categories such as crimes against property or crimes involving a controlled substance. It does not mean that only crimes against one particular person can be counted. His argument disregards the explicit statutory and guidelines language that provides that all crimes within a 5-year period, regardless of whether they resulted in conviction "shall be counted." *People v McDaniel*, 256 Mich App 165; 662 NW 2d 101 (2003)(even a 5-year period that does not include the sentencing offense may be counted under OV 13). There was no error in scoring OV 13, and no ineffective assistance of counsel in failing to object.

Under OV 9, MCL 777.39, Petitioner was apparently given a score of 10 because there were three offenses and three separate victims in the original charges. He asserts that OV 9 must be scored only with respect to single victim in the count to which he pleaded, and not the other victims in the other counts. Michigan published appellate decisions are not entirely clear on this precise issue. In *People v Raby*, 218 Mich App 78, 81; 554 NW 2d 25 (1996), *aff'd on other grounds*, 456 Mich. 487; 572 N.W.2d 644 (1998) the Michigan Court of Appeals discussed a judicial sentence guideline (a precursor to the current statutory guidelines) pertaining to criminal

sexual penetration, resolved a conflict in previous decisions, and held that evidence of prior penetrations with the victim could be considered. The Michigan Supreme Court said that it had "no disagreement with that conclusion," and affirmed the sentence, but held that those judicial guidelines were not themselves subject to appellate review since they were not required by law. 456 Mich 496, 499. There is other authority, however, that supports Petitioner's current contention. In *People v Chesebro*, 206 Mich App 468, 471-472; 522 NW 2d 677 (1994) the Court discussed another judicial sentence guideline, and said:

> We think the rule that more accurately applies the sentencing guidelines is that the offense variables are to be scored only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise.

Even if Petitioner is correct, it would not change the overall recommended minimum sentence range. Petitioner received a total PRV score of 0 and an OV score of 45, which placed him in Offense Level IV (35-49 points) with a recommended minimum sentence range of 12-24 months. MCL 777.64; Sentence Guideline Manual, p. 97; Resp. App. 56b. If OV 9 should have been scored at 0 instead of 10, he would have a total OV score of 35, which would have placed him in the same Offense Level, and he would have received the same recommended minimum sentence range. Any scoring error thus had no impact on the recommended minimum sentence range and was harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW 2d 509 (1993). Any error by counsel therefore does amount to deficient performance and petitioner was not deprived of the effective assistance of counsel.

Docket No. 01-020597

For Docket No. 01-020597, the total PRV was 20 (PRV 6, "Relationship to the Criminal Justice System" (offender on bond awaiting adjudication or sentencing for a felony) = 10 points;

PRV 7, "Subsequent or Concurrent Felony Convictions" (offender has one subsequent or concurrent conviction) = 10 points). The total OV value was 45 (OV 4 "Psychological Injury to a Victim" (serious psychological injury) = 10 points; OV 10, "Exploitation of a Vulnerable Victim" (youth) = 10 points; OV 13, "Continuing Pattern of Criminal Behavior" (three or more crimes against a person) = 25 points). Application of these values to the grid for this Crime Class yielded a Guideline Minimum Range of 29 to 57 months. Petitioner challenges the scoring of PRV 7 and OV 13, but there was no error in either scoring.

With respect to OV 13, Petitioner makes the same challenge as in Docket No. 00-019193, and it fails for the reasons discussed above.

With respect to PRV 7, MCL 777.54, ten points were scored for having one subsequent or concurrent felony conviction. MCL 777.54(2)(a) provides: "Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed." See Sentence Guidelines Manual, p. 27; Resp. App. 46b. Petitioner argues that because the offense to which he pleaded in docket no. 00-019193 was committed prior to the offense to which he pleaded in docket no. 01-020597, no points should have been scored. His contention flies in the face of the plain language of the statute and guideline. He was in fact convicted of "multiple felony counts," and he was "convicted of a felony [in docket 00-019193, regardless of when that offense was committed] after the sentencing offense [in docket 01-020597] was committed." There was no error in scoring.

Even if Petitioner is correct that there was an error in scoring, it would not change the overall recommended minimum sentence range. Petitioner received a total PRV score of 20 and an OV score of 45, which placed him in Prior Record Variable Level C (10-24 points) and Offense Level IV (35-49 points) with a recommended minimum sentence range of 29-57 months.

MCL 777.64; Sentence Guideline Manual, p. 97; Resp App. 56b. If PRV 7 should have been scored at 0 instead of 10, he would have a total PRV score of 10 which would have placed him in the same Prior Record Variable Level, and he would have received the same recommended minimum sentence range. Any scoring error thus had no impact on the recommended minimum sentence range and was harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW 2d 509 (1993). Any error by counsel therefore does amount to deficient performance and petitioner was not deprived of the effective assistance of counsel.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
Telephone: (517) 373-1124

Dated: September, 2004

APPENDIX

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Approved,SCAO

Original - Court
1st copy - Corrections
2nd copy - Corrections (for return)
3rd copy - State Police
4th copy - Defendant
5th copy - Prosecutor

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO CORRECTIONS DEPARTMENT	CASE NO. 00-019193-FH-2

ORI MI- 1730015 J
Police Report No.

Court address: 111 S. MICHIGAN AVE., SAGINAW, MICHIGAN

Court telephone no.: (517) 790-5471

THE PEOPLE OF THE STATE OF MICHIGAN

V

Defendant's name, address, and telephone no.
HALBERT, ANTONIO DWAYNE
2545 BEWICK
SAGINAW, MI 48601

CTN	SID	DOB
73-00-004569-01		12/30/67

Prosecuting attorney name	Bar no.
Michael D. Thomas	P23539

Defendant attorney name	Bar no.
O'FARRELL, RODNEY J.	P24899

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 11/7/01 (Date) of the crimes stated below:

Plea: insert "G" for guilty plea; "NC" for nolo contendere; "MI" for guilty but mentally ill. * Use "X" if sentence is to be enhanced because of Habitual Offender Act.

Count	CONVICTED BY Plea*	Court*	Jury	CRIME	CHARGE (CODE(S) MCL citation/PACC Code
1	NC			2ND DEG CSC-U/13	750.520C1A

☐ 2. The conviction is reportable to the Secretary of State under MCL 257.732 or MCL 281.1040.
The defendant's driver license number is: _____

☐ 3. HIV testing was ordered on 12/10/2001 (Date). Confidential test results are on file.

IT IS ORDERED:

4. Defendant is sentenced to custody of Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM Years	MINIMUM Mos.	MINIMUM Days	MAXIMUM Years	MAXIMUM Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	JAIL CREDIT Days	OTHER INFORMATION
1	12/10/01		24		15		12/10/01		164	PRIOR TO & CONSECUTIVE
										W/01-20597-FH-2

☐ Defendant shall pay restitution of $ _____. If a cash bond/bail was personally posted by the defendant, payment toward restitution is to first be collected out of that bond/bail and allocated as specified under MCL 775.22.

☐ 5. Sentence(s) to be served consecutively to:
☐each other. ☐case numbers 01-20597-FH-2

6. Defendant shall pay a $60.00 assessment for the Crime Victim Rights Fund.

7. Court recommendation:

☐ 8. Defendant shall pay a $150.00 assessment for forensic lab test.

12/11/01 (Date)

Judge ROBERT L. KACZMAREK — P15639 (Bar no.)

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Deputy court clerk

MCL 765.15(2); MSA 28.902(2), MCL 769.16a; MSA 28.1086(1), MCL 775.22; MSA 28.1259, MCL 780.766; MSA 28.1287(766)

CC 219b (6/98) **JUDGMENT OF SENTENCE, COMMITMENT TO CORRECTIONS DEPARTMENT** MCR 6.427(A)

1b

539Lc1

Approved,SCAO

Original - Court
1st copy - Corrections
2nd copy - Corrections (for return)
3rd copy - State Police
4th copy - Defendant
5th copy - Prosecutor

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO CORRECTIONS DEPARTMENT	CASE NO. 01-020597-FH-2

ORI MI- 1730015 J
Police Report No.

Court address: 111 S. MICHIGAN AVE., SAGINAW, MICHIGAN

Court telephone no.: (517) 790-5471

THE PEOPLE OF THE STATE OF MICHIGAN

V

Defendant's name, address, and telephone no.
HALBERT, ANTONIO DWAYNE
1602 WALNUT
SAGINAW, MI 48601

CTN	SID	DOB
73-01-004748-01		12/30/67

Prosecuting attorney name	Bar no.
Michael D. Thomas	P23539

Defendant attorney name	Bar no.
O'FARRELL, RODNEY J.	P24899

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 11/7/01 (Date) of the crimes stated below:

Plea: insert "G" for guilty plea; "NC" for nolo contendere; "MI" for guilty but mentally ill. * Use "X" if sentence is to be enhanced because of Habitual Offender Act.

Count	CONVICTED BY Plea*	Court*	Jury	CRIME	CHARGE (CODE(S) MCL citation/PACC Code
1	NC			CSC 2ND DEGREE-RELAT	750.520C1B

☐ 2. The conviction is reportable to the Secretary of State under MCL 257.732 or MCL 281.1040.
The defendant's driver license number is: _____

☐ 3. HIV testing was ordered on 12/10/01 (Date). Confidential test results are on file.

IT IS ORDERED:

4. Defendant is sentenced to custody of Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM Years	MINIMUM Mos.	MINIMUM Days	MAXIMUM Years	MAXIMUM Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	JAIL CREDIT Days	OTHER INFORMATION
1	12/10/01		57		15		12/10/01		0	CONSECUTIVE W/00-19193FH2

☐ Defendant shall pay restitution of $ _____. If a cash bond/bail was personally posted by the defendant, payment toward restitution is to first be collected out of that bond/bail and allocated as specified under MCL 775.22.

☒ 5. Sentence(s) to be served consecutively to:
☐each other. ☐case numbers 00-19193-FH-2

6. Defendant shall pay a $60.00 assessment for the Crime Victim Rights Fund.

7. Court recommendation:

☐ 8. Defendant shall pay a $150.00 assessment for forensic lab test.

12/11/01 (Date)

Judge ROBERT L. KACZMAREK — P15639 (Bar no.)

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Deputy court clerk

MCL 765.15(2); MSA 28.902(2), MCL 769.16a; MSA 28.1086(1), MCL 775.22; MSA 28.1259, MCL 780.766; MSA 28.1287(766)

CC 219b (6/98) **JUDGMENT OF SENTENCE, COMMITMENT TO CORRECTIONS DEPARTMENT** MCR 6.427(A)

2b

2780-00

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

File No. 01-019193-FH-2
Judge Robert L. Kaczmarek

V
ANTONIO DEWAYNE HALBERT
Defendant.

ORDER DENYING DEFENDANT'S REQUEST FOR APPOINTMENT
OF COUNSEL TO FILE APPLICATION FOR LEAVE TO APPEAL

At a session of said Court, held in the Courthouse in the City and County of Saginaw, State of Michigan, on the 27 day of December, 2001

PRESENT: HONORABLE Robert L. Kaczmarek, Circuit Court Judge

In this cause, defendant has filed a request for a court appointed attorney to assist him in filing an Application for Leave to Appeal to the Court of Appeals following a voluntary plea.

The Court denies appointment of an attorney at public expense for the following reasons:

☐ 1. The defendant does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal. People v Bulger, 462 Mich 495 (2000), cert den 121 SCt 486.

☐ 2. The defendant fails to set forth any meritorious issue as required by People v Najar, 229 Mich 393 (1998) .

☐ 3. The defendant's plea was not conditional.

☐ 4. The defendant's sentence was in accordance with the plea bargain.

☐ 5. The defendant specifically and voluntarily waived his right to have an attorney appointed at public expense to assist him in filing an application for Leave to Appeal or to assist with other post conviction remedies.

☐ 6. The defendant's sentence was within the sentencing guidelines.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that defendant's petition for appointment of a court-appointed attorney to assist him in filing an Application for Leave to Appeal be and the same is denied.

Robert L. Kaczmarek

Robert L. Kaczmarek, Circuit Court Judge

I certify on this date I mailed a copy of this order denying appointment of counsel to defendant and prosecutor. I also mailed a copy of the defendant's request for appointment of counsel to the prosecutor.

DATE: 12-27-01

Vicki K. Nehan

JNN DENYCNC

A TRUE COPY
SUSAN [illegible] Clerk

Approved, SCAO

Original - Trial court
1st copy - Prosecutor
2nd copy - Defendant/Juvenile for
3rd copy - Defendant/Juvenile

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY	NOTICE OF RIGHTS AFTER SENTENCING (AFTER PLEA OF GUILTY/ NOLO CONTENDERE) AND REQUEST FOR APPOINTMENT OF ATTORNEY	CASE NO. 00-19193-FH-2 Judge: R.L.KACZMAREK (I

Court address 111 SO. MICHIGAN AVE., SAGINAW, MI 48602 Court telephon

THE PEOPLE OF THE STATE OF MICHIGAN v Defendant/Juvenile name, address, telephone no., and date of b ANTONIO DEWAYNE HALBERT

NOTICE OF APPEAL RIGHTS Note to Court: This Notice must be given to the defendant/juvenile at sentencing

1. If you wish to appeal your plea or sentence, you may file an application for leave to appeal with the Court of Appeals.

2. If you request the appointment of an attorney and are found indigent, the court must appoint an attorney if: a) the prosecut attorney seeks leave to appeal; or b) your sentence exceeds the upper limit of the minimum sentence range of the applica sentencing guidelines; or c) the Court of Appeals or the Supreme Court grants your application for leave to appeal; or d) y seek leave to appeal a conditional plea under MCR 6.301(C)(2).

   If you request the appointment of an attorney and are found indigent, the court may appoint an attorney if: a) you seek lea to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable; and b) you object to the scoring or otherwise preserved the matter for appeal; and c) the sentence imposed by the court constitutes an upwa departure from the upper limit of the minimum sentence range that you allege should have been scored.

3. A request for the appointment of an attorney must be made in writing and sent directly to the court at the address noted abov within 42 days. The financial schedule on the back of this form must be completed.

RECEIPT OF NOTICE OF APPEAL RIGHTS AND APPLICATION FOR LEAVE TO APPEAL

On this day I received this form and financial schedule and an application for leave to appeal. I understand that I must return th completed Request for Appointment of Attorney to the court within 42 days if I want an attorney appointed for my appeal.

12 December 200 — Date

Antonio D Halbert — Signature of defendant/juvenile

REQUEST FOR APPOINTMENT OF ATTORNEY AND AFFIDAVIT OF INDIGENCY

I request appointment of an attorney to appeal my conviction. Conditions for my request are on the back of this form. The affidavit of indigency and financial schedule on the back of this form is submitted to show my financial condition.

☐ I request the court waive the filing fee for my application for leave to appeal.

12 December 200 — Date

Antonio D Halbert — Signature of defendant/juvenile

NOTE TO DEFENDANT/JUVENILE After completing the request for appointment of attorney and the affidavit of indigency and financial schedule, keep one copy for yourself and return the other copy to the court

AFFIDAVIT OF INDIGENCY AND FINANCIAL SCHEDULE

I request a court appointed attorney and submit the following information:

1. RESIDENCE ☐ Rent ☐ Own ☐ Live with parents ☐ Room/Board ☒ Prison _____ Number

2. MARITAL STATUS ☐ Single ☐ Married ☐ Divorced ☒ Separated ☐ Dependents: _____ Number

3. INCOME a. Employer name and address: None

b. Length of employment: N/A

c. Average of pay ☐ weekly ☐ monthly ☐ every two we Gross: $ _____ Net: $ _____

d. Other income (state monthly amount and source [DSS, VA, rent, pensions, spouse, unemployment, etc.]) If no income, state NONE.

None

4. ASSETS State value of car, home, bank deposits, inmate accounts, bonds, stocks, etc. If no assets, state NONE. Attach an account statement and certification for assets in prison accounts.

None

5. OBLIGATIONS Itemize monthly rent, installment payments, mortgage payments, child support, etc.

None

6. REIMBURSEMENT I understand that I may be ordered to reimburse the court for all or part of my attorney and defense cos

7. I pled guilty, guilty but mentally ill, or nolo contendere and
   ☐ a. my sentence exceeds the upper limit of minimum sentence range of the applicable sentencing guidelines. Therefore I am entitled to a court appointed attorney if the court finds me indigent.
   ☑ b. I seek leave to appeal a conditional plea made under MCR 6.301(C)(2). Therefore, I am entitled to a court appointed attorney if the court finds me indigent.
   ☑ c. I believe the offense variable or a prior record variable was improperly scored and I objected to the scoring at sentencin I state that the sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelin as I believe they should have been scored. Therefore, the court may appoint a court appointed attorney if the court fin me indigent.

Signature

Antonio Dwayne Halbert
Name (type or print)

Address

City, state, zip

Subscribed and sworn to before me on _____ Date _____ County, Michigan

3391-01

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

File No. 01-020597-FH-2
Judge Robert L. Kaczmarek

V
ANTONIO DEWAYNE HALBERT
Defendant.

ORDER DENYING DEFENDANT'S REQUEST FOR APPOINTMENT
OF COUNSEL TO FILE APPLICATION FOR LEAVE TO APPEAL

At a session of said Court, held in the Courthouse in the City and County of Saginaw, State of Michigan, on the 26 day of December, 2001

PRESENT: HONORABLE Robert L. Kaczmarek, Circuit Court Judge

In this cause, defendant has filed a request for a court appointed attorney to assist him in filing an Application for Leave to Appeal to the Court of Appeals following a voluntary plea.

The Court denies appointment of an attorney at public expense for the following reasons:

☑ 1. The defendant does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal. People v_ Bulger, 462 Mich 495 (2000), cert den 121 SCt 486.

☑ 2. The defendant fails to set forth any meritorious issue as required by People v_ Najar, 229 Mich 393 (1998) .

☑ 3. The defendant's plea was not conditional.

☑ 4. The defendant's sentence was in accordance with the plea bargain.

☑ 5. The defendant specifically and voluntarily waived his right to have an attorney appointed at public expense to assist him in filing an application for Leave to Appeal or to assist with other post conviction remedies.

☐ 6. The defendant's sentence was within the sentencing guidelines.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that defendant's petition for appointment of a court-appointed attorney to assist him in filing an Application for Leave to Appeal be and the same is denied.

Robert L. Kaczmarek

Robert L. Kaczmarek, Circuit Court Judge

I certify on this date I mailed a copy of this order denying appointment of counsel to defendant and prosecutor. I also mailed a copy of the defendant's request for appointment of counsel to the prosecutor.

DATE: 12-27-01

Vickie K. Mahan

JNN DENYCNC

A TRUE COPY
SUSAN KNEVEVICH, Clerk

Approved, SCAO

Original - Trial court
1st copy - Prosecutor
2nd copy - Defendant/Juvenile for
3rd copy - Defendant/Juvenile

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY	NOTICE OF RIGHTS AFTER SENTENCING (AFTER PLEA OF GUILTY/ NOLO CONTENDERE) AND REQUEST FOR APPOINTMENT OF ATTORNEY	CASE NO. 01-20597-FH-2 Judge: R.L.KACZMAREK (P

Court address 111 SO. MICHIGAN AVE., SAGINAW, MI 48602 Court telephon

THE PEOPLE OF THE STATE OF MICHIGAN v

Defendant/Juvenile name, address, telephone no., and date of b

ANTONIO DWAYNE HALBERT

NOTICE OF APPEAL RIGHTS Note to Court: This Notice must be given to the defendant/juvenile at sentencing

1. If you wish to appeal your plea or sentence, you may file an application for leave to appeal with the Court of Appeals.

2. If you request the appointment of an attorney and are found indigent, the court must appoint an attorney if: a) the prosecut attorney seeks leave to appeal; or b) your sentence exceeds the upper limit of the minimum sentence range of the applica sentencing guidelines; or c) the Court of Appeals or the Supreme Court grants your application for leave to appeal; or d) y seek leave to appeal a conditional plea under MCR 6.301(C)(2).

   If you request the appointment of an attorney and are found indigent, the court may appoint an attorney if: a) you seek lea to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable; and b) you objecte to the scoring or otherwise preserved the matter for appeal; and c) the sentence imposed by the court constitutes an upwa departure from the upper limit of the minimum sentence range that you allege should have been scored.

3. A request for the appointment of an attorney must be made in writing and sent directly to the court at the address noted abov within 42 days. The financial schedule on the back of this form must be completed.

RECEIPT OF NOTICE OF APPEAL RIGHTS AND APPLICATION FOR LEAVE TO APPEAL

On this day I received this form and financial schedule and an application for leave to appeal. I understand that I must return the completed Request for Appointment of Attorney to the court within 42 days if I want an attorney appointed for my appeal.

12 December 2001
Date

Antonio D Halbert
Signature of defendant/juvenile

REQUEST FOR APPOINTMENT OF ATTORNEY AND AFFIDAVIT OF INDIGENCY

I request appointment of an attorney to appeal my conviction. Conditions for my request are on the back of this form. The affidavit of indigency and financial schedule on the back of this form is submitted to show my financial condition.

☑ I request the court waive the filing fee for my application for leave to appeal.

12 December 2001
Date

Antonio D Halbert
Signature of defendant/juvenile

NOTE TO DEFENDANT/JUVENILE: After completing the request for appointment of attorney and the affidavit of indigency and financial schedule, keep one copy for yourself and return the other copy to the court.

AFFIDAVIT OF INDIGENCY AND FINANCIAL SCHEDULE

I request a court appointed attorney and submit the following information:

1. **RESIDENCE** ☐ Rent ☐ Own ☐ Live with parents ☐ Room/Board ☒ Prison _____ Number

2. **MARITAL STATUS** ☐ Single ☐ Married ☐ Divorced ☒ Separated ☐ Dependents: _____ Number

3. **INCOME** a. Employer name and address: None

   b. Length of employment: 17

   c. Average of pay ☐ weekly ☐ monthly ☐ every two w
   Gross: $ _____ Net: $ _____

   d. Other income (state monthly amount and source [DSS, VA, rent, pensions, spouse, unemployment, etc.]) If no income, state NONE.: None

4. **ASSETS** State value of car, home, bank deposits, inmate accounts, bonds, stocks, etc. If no assets, state NONE. Attach an account statement and certification for assets in prison accounts.: None

5. **OBLIGATIONS** Itemize monthly rent, installment payments, mortgage payments, child support, etc.: None

6. **REIMBURSEMENT** I understand that I may be ordered to reimburse the court for all or part of my attorney and defense co

7. I pled guilty, guilty but mentally ill, or nolo contendere and
   ☐ a. my sentence exceeds the upper limit of minimum sentence range of the applicable sentencing guidelines. Therefor I am entitled to a court appointed attorney if the court finds me indigent.
   ☐ b. I seek leave to appeal a conditional plea made under MCR 6.301(C)(2). Therefore, I am entitled to a court appointe attorney if the court finds me indigent.
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Antonio D Halbert
Signature

Antonio Dwayne Halbert
Name (type or print)

Jackson Pl 2
Address

[illegible] MI [illegible]
City, state, zip

Subscribed and sworn to before me o

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

V.

File No. 00-019193-FH-2
01-020597-FH-2

ANTONIO D. HALBERT,

Defendant.
_____/

ORDER OF THE COURT

At a session of said Court, held in the Courthouse in the City and County of Saginaw, State of Michigan, on the 25th day of October, 2002.

PRESENT: HONORABLE ROBERT L. KACZMAREK, CIRCUIT JUDGE.

This matter comes before the Court for the Appointment of Counsel. In the instant case, an Order was issued by the Court denying the Defendant's Motion for Appellate Counsel. Having reviewed the case and current case law, the defendant does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal. *People v. Bulger*, 462 Mich 495 (2000), *cert den* 121 S.Ct. 486.

THEREFORE, IT IS HEREBY ORDERED that defendant's Motion for Appointment of Counsel is **DENIED**.

It is so ordered.

ROBERT L. KACZMAREK
Circuit Judge
10th Judicial Circuit

Dated: October 25 2002.

A TRUE COPY
Susan Kattenbach, Clerk

Court of Appeals, State of Michigan

ORDER

PEOPLE v ANTONIO DWAYNE HALBERT

Docket No. 244756

LC No. 00-19193-FH-2; 01-020597-FH-2

HILDA R. GAGE
Presiding Judge

E. THOMAS FITZGERALD

HENRY WILLIAM SAAD
Judges

The Court orders that the defendant-appellant's delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

HILDA R. GAGE
Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 13 2003
Date

Sandra Schultz Mengel
Chief Clerk

Order

Entered: September 19, 2003

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

123342

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ANTONIO DWAYNE HALBERT,
Defendant-Appellant.

SC: 123342
COA: 244756
Saginaw CC: 00-19193-FH-2;
01-020597-FH-2

On order of the Court, the application for leave to appeal the January 13, 2003 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, J., states as follows:

I would remand to the Court of Appeals for reconsideration of the defendant's application for leave to appeal. I would further direct the Court of Appeals, before reconsidering the application, to remand the case to the Saginaw Circuit Court for appointment of counsel. Counsel then could, within a reasonable time limit set by the Court of Appeals, file a supplement which the Court of Appeals would consider as though it were a part of the defendant's initial application.

Kelly, J., joins in the statement of Cavanagh, J.

s0916

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2003 Robin R. Davis

13b

Approved, SCAO

Information - Circuit court
Original complaint - Court
Warrant - Court

Bind over/Transfer - Circuit/Juvenile court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN JUDICIAL DISTRICT 10th JUDICIAL CIRCUIT	Page 1 of 3 INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 00-019193 FH-2

District Court ORI: MI-

Circuit Court ORI: MI-

THE PEOPLE OF THE STATE OF MICHIGAN v

Defendant's name and address: ANTONIO DWAYNE HALBERT, 2545 BEWICK, SAGINAW, MI 48601

Victim or complainant: LORETTA PRICE

Complaining witness: LORETTA PRICE

Co-defendant(s)

Date: On or about x before 6/27/00

City/Twp./Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
VARIOUS LOCATIONS IN SAGINAW COUNTY		73 00 004569 01		12/30/67

Police agency report no.	Charge	Maximum penalty
856 2223-00		

Defendant DLN

Witnesses

* LORETTA PRICE	* SHAVONNE HARRIS	* JAMES BAKER
* R. WEATHERSPOON	* SHARNAE PERRY	WAVONNE HALBERT
K. MCINERNEY	* ALEXANDRIA BEVERLY	* ERICA FAIRRES
* MARIA MCKINNEY	* DWAYNE FAIRRES	* HELEN DRAKE
* FRED CAVAZOS	* EBONIE MCKINNEY	

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

COUNT I - SECOND DEGREE CRIMINAL SEXUAL CONDUCT - PERSON UNDER THIRTEEN

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Maria McKinney at the Buena Vista Community Center at 1940 S. Outer Drive on June 27, 2000, said person being under 13 years of age; Contrary to Sec. 750.520c(1)(a); M.S.A. 28.788(3)(1)(a). (750.520C1A)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

and against the peace and dignity of the State of Michigan.

Date 11/2/00

Prosecuting Attorney

By: Barbara L. Meter

BARBARA L. METER

14b

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq.; MCR 6.112(D)

MC 200 (4/99) FELONY SET Information

Approved, SCAO

Information - Circuit court
Original complaint - Court
Warrant - Court

Bind over/Transfer - Circuit/Juvenile court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN JUDICIAL DISTRICT 10th JUDICIAL CIRCUIT	Page 2 of 3 INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 00-019193 FH-2

District Court ORI: MI- Circuit Court ORI: MI-

THE PEOPLE OF THE STATE OF MICHIGAN v	Defendant's name and address: ANTONIO DWAYNE HALBERT 2545 BEWICK SAGINAW, MI 48601	Victim or complainant: LORETTA PRICE
		Complaining witness: LORETTA PRICE
Co-defendant(s)		Date: On or ~~about~~ before 6/27/00

City/Twp./Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
VARIOUS LOCATIONS IN SAGINAW COUNTY		73 00 004569 01		12/30/67

Police agency report no.	Charge	Maximum penalty
856 2223-00		

Defendant DLN:

Witnesses

* LORETTA PRICE	* SHAVONNE HARRIS	*JAMES BAKER
* R. WEATHERSPOON	* SHARNAE PERRY	WAVONNE HALBERT
K. MCINERNEY	* ALEXANDRIA BEVERLY	* ERICA FAIRRES
* MARIA MCKINNEY	* DWAYNE FAIRRES	* HELEN DRAKE
* FRED CAVAZOS	* EBONIE MCKINNEY	

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

COUNT II - SECOND DEGREE CRIMINAL SEXUAL CONDUCT - RELATIONSHIP

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shavonne Harris. at 2545 Bewick, on a date in April or May 2000, said victim being at least 13 but less than 16 years of age, to-wit: 13 years old, and the defendant being a member of the same household as the victim; Contrary to Sec. 750.520c(1)(b); M.S.A. 28.788(3)(1)(b). (750.520C1B)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction, the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

By: _____

BARBARA L. METER

Date

15b

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq., MCR 6.112(D)

MC 200 (4/99) FELONY SET Information

Approved, SCAO

Information - Circuit court
Original complaint - Court
Warrant - Court

Bind over/Transfer - Circuit/Juvenile court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN JUDICIAL DISTRICT 10th JUDICIAL CIRCUIT	Page 3 of 3 INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 00-019193 FH-2

District Court ORI: MI- Circuit Court ORI: MI-

THE PEOPLE OF THE STATE OF MICHIGAN v	Defendant's name and address: ANTONIO DWAYNE HALBERT 2545 BEWICK SAGINAW, MI 48601	Victim or complainant: LORETTA PRICE
		Complaining witness: LORETTA PRICE
Co-defendant(s)		Date: On or ~~about~~ before 6/27/00

City/Twp./Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
VARIOUS LOCATIONS IN SAGINAW COUNTY		73 00 004569 01		12/30/67

Police agency report no.	Charge	Maximum penalty
856 2223-00		

Defendant DLN:

Witnesses

* LORETTA PRICE	* SHAVONNE HARRIS	* JAMES BAKER
* R. WEATHERSPOON	* SHARNAE PERRY	WAVONNE HALBERT
K. MCINERNEY	* ALEXANDRIA BEVERLY	* ERICA FAIRRES
* MARIA MCKINNEY	* DWAYNE FAIRRES	* HELEN DRAKE
* FRED CAVAZOS	* EBONIE MCKINNEY	

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

COUNT III - SECOND DEGREE CRIMINAL SEXUAL CONDUCT - PERSON UNDER THIRTEEN

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shar'nae Perry, at 2545 Bewick, on a date in June 2000, said person being under 13 years of age; Contrary to Sec. 750.520c(1)(a); M.S.A. 28.788(3)(1)(a). (750.520C1A)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

By: _____

BARBARA L. METER

Date

16b

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq., MCR 6.112(D)

MC 200 (4/99) FELONY SET Information

Approved, SCAO

Information - Circuit court
Original complaint - Court
Warrant - Court

Bind over/Transfer - Circuit/Juvenile court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN JUDICIAL DISTRICT 10th JUDICIAL CIRCUIT	INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 01-020597 FH-2

District Court ORI: MI- Circuit Court ORI: MI-

Defendant's name and address	Victim or complainant
THE PEOPLE OF THE STATE OF MICHIGAN v ANTONIO DWAYNE HALBERT 2545 BEWICK SAGINAW, MI 48601	RUSS UPHOLD
	Complaining witness: RUSS UPHOLD
Co-defendant(s)	Date: On or about 7/17/01

City/Twp /Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
2545 BEWICK, BUENA VISTA TOWNSHIP		73 01 004748 01		12/30/67

Police agency report no	Charge	Maximum penalty
856 2825-01		Defendant DLN

Witnesses

* RUSS UPHOLD
* SHAVONNE CHARLENE HARRIS
BETTY BLONIARCZYK
* ROYANA SILER
* ARETHA BLACKMON
CONNIE CHAPIN
DAZARENE BLEDSON
* CRAIG TUER
* NEIL SOMERS
* DAN REINHARDT

STATE OF MICHIGAN, COUNTY OF Saginaw
IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

SECOND DEGREE CRIMINAL SEXUAL CONDUCT - RELATIONSHIP
One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shavonne Harris, said victim being at least 13 but less than 16 years of age, to-wit: Age 14 years, and the defendant being related to the victim by blood or affinity to the fourth degree; Contrary to Sec. 750.520c(1)(b); M.S.A. 28.788(3)(1)(b). (750.520C1B)

HIV/STD TESTING NOTICE
Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction, the court must order the defendant to be tested.
FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant o 1986 PA 46.

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

10-8-01
Date

By: [signature]
PAUL M. FEHRMAN

17b

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq., MCR 6.112(D)

MC 200 (4/89) **FELONY SET, Information**

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN

vs. File Nos. 00-019193-FH-2
01-020597-FH-2

ANTONIO DWAYNE HALBERT,

Defendant.
_____/

PLEA

BEFORE THE HONORABLE ROBERT L. KACZMAREK, CIRCUIT JUDGE

Saginaw, Michigan - November 7, 2001

APPEARANCES:

For the People: PAMELA A. MARSHALL (P54055)
ASSISTANT PROSECUTING ATTORNEY
111 S. Michigan Avenue
Saginaw, MI 48602-2019
(989) 790-5330

For Defendant: RODNEY J. O'FARRELL (P24899)
Attorney at Law
1609 Court Street
Saginaw MI 48602-4070
(989) 792-9767

Reported by: KATHRYN A. TAGGET, RMR, CSR-3584
Official Court Reporter

MS. MARSHALL: Pamela Marshall for the People.

These matters were set for trial yesterday. We have reached a plea agreement in these cases. It's my understanding the defendant will be pleading guilty to Count I, CSC second-degree under 13 on case 00-19193 and that should be involving the victim, Maria McKinney. I'm sorry, that's a no contest plea. He will also be pleading no contest to Count I on case 01-020597-FH-2, criminal sexual conduct second-degree, relationship, and that victim is Shayvon Harris.

In exchange for pleas of no contest on those two counts, the People agree to dismiss Count II and Count III on case 00-019193-FH-2. We also recommend the defendant be sentenced within the guidelines and we're requesting consecutive sentencing in this matter that is discretionary with the Court. And it's my understanding defendant will be requesting concurrent sentencing, but we are requesting consecutive.

And the no contest plea -- I believe we provided the police reports to the Court. We would both stipulate to those as the basis for the no contest plea, and the reason for the no contest plea is the possibility of civil liability.

MR. O'FARRELL: Your Honor, Rod O'Farrell on

behalf Mr. Halbert. That's a correct statement. This is what I have discussed with my client, Your Honor. He does understand it and we do wish to enter a plea of no contest to the two counts as referred to contained in these two cases.

The potential for consecutive sentencing is discretionary with the Court because the second offense occurred while on bond for the first offense, Your Honor. I would state further that the civil liability in this case is active. There is neglect proceedings involving my client and specifically the mother of Shayvon in the second case and that also was affected by the first case since Shayvon was a victim in one of the cases that is being dismissed in that case.

With that being said, Your Honor, I believe my client does understand this agreement and is prepared to enter into the plea of no contest at this time, and we do stipulate to the reports as referred to by the prosecutor.

(Defendant sworn.)

THE COURT: Your name, sir?

THE DEFENDANT: Antonio Halbert, Antonia Dwayne, Halbert.

THE COURT: Are you presently on probation or parole?

THE DEFENDANT: No.

THE COURT: Do you understand the maximum penalty for these offenses is 15 years?

THE DEFENDANT: Yes, sir.

THE COURT: You understand if I accept your no contest plea we'll not have a trial of any kind and you will give up certain rights that you have at a trial?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you have a right to a trial by a jury?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You also have a right to a trial by the Court without a jury with the consent of both the prosecutor and the trial judge. You have a right to a non-jury trial.

THE DEFENDANT: Yes, sir, I understand, I do.

THE COURT: By entering these pleas you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to be presumed innocent until proven guilty at the trial, do you

understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to have the burden of proving your guilt beyond a reasonable doubt placed on the prosecution throughout the trial, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to have the witnesses appear against you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to question the witnesses who appear against you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to have the Court order any witnesses you wished produced for your defense to appear at the trial, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to remain silent during the trial; in other words, you don't have to testify. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right not to have your silence used against you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: And you have a right to testify at the trial if you want to, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are

giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right.

THE DEFENDANT: Yes, sir.

THE COURT: You are also giving up any claim this plea was the result of any promise or consideration which was not placed on the record here in court.

THE DEFENDANT: Yes, sir.

THE COURT: And you are giving up any claim this plea is not of your own free will.

THE DEFENDANT: Yes, sir.

THE COURT: You understand if I accept your plea and you are financially unable to retain a lawyer to represent you on appeal, the Court must appoint an attorney for you if the sentence I impose exceeds the sentencing guidelines or you seek leave to appeal a conditional plea or the prosecutor seeks leave to appeal or the Court of Appeals or Supreme Court grants you leave to appeal. Under those conditions I must appoint an attorney, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Further, if you are financially

unable to retain a lawyer to represent you on appeal, the Court may appoint an attorney for you if you allege an improper scoring of the sentencing guidelines, you object to the scoring at the time of the sentencing and the sentence I impose exceeds the sentencing guidelines as you allege it should be scored. Under those conditions I may appoint an attorney for you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, as I understand what's happening today, in Case Number -- the case involving Maria McKinney, you are entering a no contest plea to second-degree criminal sexual conduct.

THE DEFENDANT: Yes, sir.

THE COURT: And in the case -- also a case involving Shayvon Harris, you are entering a no contest plea to second-degree criminal sexual conduct.

THE DEFENDANT: Yes, sir.

THE COURT: In exchange for that, Counts II, III -- and in regard to -- the Maria McKinney Information would be dismissed.

Further, the People are recommending that you be sentenced within the guidelines, although they are requesting consecutive sentencing and your counsel is indicating he's going to make a request for concurrent

sentencing. Is that your understanding of the agreement?

THE DEFENDANT: Yes, sir.

THE COURT: Counsel, have I correctly stated the agreement?

MR. O'FARRELL: You have.

MS. MARSHALL: Yes, Your Honor.

THE COURT: Any other promises or considerations I should be made aware of?

MR. O'FARRELL: There are none.

MS. MARSHALL: People are aware of none.

THE COURT: Has anyone promised you anything beyond what I've stated here on the record to induce you to make this plea?

THE DEFENDANT: No, sir.

THE COURT: Has anyone threatened you in any manner to induce you to make this plea?

THE DEFENDANT: No, sir.

THE COURT: Is it your own choice to plead no contest to both these charges?

THE DEFENDANT: Yes, it is, sir.

THE COURT: The Court has reviewed the preliminary examination in the case involving Maria McKinney and -- and I read the police reports involving Shayvon Harris and I find that if the information

contained in there were believed by the trier of fact they would prove beyond a reasonable doubt the elements of the two charges here.

Furthermore, because of the potential for civil litigation, the very nature of the case, the no contest plea is appropriate.

Do counsel believe I've complied with the court rule regarding no contest pleas?

MS. MARSHALL: People, are satisfied.

MR. O'FARRELL: Yes, Your Honor.

THE COURT: I will state for the record I have not agreed on a possible plea or possible sentence with the prosecutor, the defendant or anyone acting in the interest of either. I find the plea understandingly made, voluntary and accurate. I'll accept it. I'll refer the matter to the department of corrections for a presentence investigation.

MS. MARSHALL: Thank you.

MR. O'FARRELL: Thank you, Your Honor.

(Plea concluded.)

* * *

STATE OF MICHIGAN)
) SS
COUNTY OF SAGINAW)

I, Kathryn A. Tagget, Official Court Reporter, do hereby certify that I reported in shorthand the proceedings held in the above-entitled cause before the Honorable Robert L. Kaczmarek, Circuit Judge, in Saginaw, Michigan

I further certify that the attached and foregoing pages constitute a full, true and correct transcription of my shorthand notes then and there taken.

Kathryn A. Tagget

Kathryn A. Tagget, RMR, CSR-3584
Official Court Reporter
111 South Michigan Avenue
Saginaw, MI 48602

MICHIGAN SENTENCING GUIDELINES MANUAL

2001 EDITION

Crime Lists Effective October, 2001

WEST GROUP

29b

Michigan Sentencing Guidelines Manual

2001 Edition

Crime Lists Effective October, 2001

GENERAL INFORMATION AND INSTRUCTIONS FOR USE OF THE SENTENCING GUIDELINES

There are sentencing guidelines for all offenses which are designated as felonies, and all misdemeanor offenses punishable by more than one (1) year of incarceration, except for offenses for which there is no judicial discretion in determining the sentence. As felony offenses are newly enacted or revised, it is anticipated that those offenses will be added to the sentencing guidelines.

If the sentencing judge determines to impose an enhanced sentence pursuant to the habitual offender statutes, the appropriate sentence range will be found in the habitual offender grids.

In instances where there are multiple conviction counts for a single offender, a sentencing information report (SIR) should be completed for the conviction offense that has the highest Crime Class. In instances where the sentences imposed will be served consecutively, an SIR should be completed for every crime that will be served consecutively.

The minimum sentence may not in any case exceed two-thirds of the statutory maximum sentence.

STEP I: Determine Proper Crime Group

A. All offenses have been sorted into six Crime Groups. The Crime Groups are:

Crimes Against a Person
Crimes Against Property
Crimes Involving a Controlled Substance
Crimes Against Public Order
Crimes Against Public Safety
Crimes Against Public Trust

The Crime Group of the conviction offense governs which Offense Variables are to be scored. The applicable Crime Group may be identified by consulting one of the three offense lists contained in this manual. All guideline offenses have been separately listed alphabetically by the common name of the offense and by MCL number.

If the word "Variable" appears in the column marked Crime Group, determine the offense category, offense variable level, and prior record variable level based on the underlying offense.

STEP II: Determine Prior Record Score

1. All seven Prior Record Variables should be scored for all offenses. Where no points are appropriate for a particular Prior Record Variable, a score of zero (0) should be indicated in the appropriate space. The Prior Record Variable Score will determine the offender's Prior Record Variable Level.

Effective date 10-1-2000

2. Prior Record Variables 1 through 6 refer only to prior convictions. Concurrent and Subsequent convictions should be scored in Prior Record Variable 7 and not in Variables 1 through 6.

3. Determine the offender's score on each variable by determining the single applicable category with the highest point.

4. The determination of whether a prior felony conviction or corresponding adjudication is "high" or "low" severity is determined by reference to the Crime Class of the prior conviction or corresponding adjudication. Felonies classified M2 (second degree murder) and A through D are "high severity", felonies classified E through H are "low severity". The applicable Crime Class may be identified by consulting one of the three offense lists contained in this manual. All guideline offenses have been separately listed ~~(1)~~ alphabetically by the common name of the offense, (2) by Crime Class, and (3) by MCL number.

5. In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 years or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

   Apply this by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and determine the time between the commission date of that prior conviction and the discharge date of the next earlier prior conviction or juvenile adjudication. If that period is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring the prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables. Repeat this determination for each remaining prior conviction or juvenile adjudication until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain. If a discharge date is not available, add either the time the offender was sentenced to probation or the length of the minimum incarceration term to the date of conviction and use that date as the discharge date. Discharge date means the date an individual is discharged from the jurisdiction of the court or the department of corrections after being convicted of or adjudicated responsible for a crime or an act that would be a crime if committed by an adult.

STEP III. Determine Offense Variable Score

1. Once the proper crime group is determined, the appropriate Offense Variables for that offense should be scored. Where no points are appropriate for a particular Offense Variable, a score of zero (0) should be indicated in the appropriate space. Only the variables that need to be scored for the particular crime are behind the crime group divider.

2. The total Offense Variable score will determine the severity level for that offense within the appropriate grid. Once each of the Offense Variables have been scored, the total points should be placed on the score sheet and the corresponding Offense Variable Level noted.

3. Determine the offender's score on each variable by determing the single applicable category with the highest point.

Effective date 10-1-2000

4. For all Crimes Against a Person, score Offense Variables 1, 2, 3, 4, 7, 8, 9, 10, 11,12,13,14, and 19. Score Offense Variables 5 and 6 for homicide or attempted homicide or assault with intent to commit murder. Score Offense Variable 16 for a violation or attempted violation of Home Invasion First or Second. Score Offense Variables 17 and 18 if an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.

5. For all Crimes Against Property, score Offense Variables 1, 2, 3, 4, 9, 10, 12, 13, 14, 16, and 19.

6. For all Crimes Involving a Controlled Substance, score Offense Variables 1, 2, 3, 12, 13, 14, 15, and 19.

7. For all Crimes Against Public Order, score Offense Variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19.

8. For all Crimes Against Public Safety, score Offense Variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19. Score Offense Variables 18 if an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.

9. For all Crimes Against Public Trust, score Offense Variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19.

STEP IV. Determine Proper Crime Class and Grid

1. Substantive Offenses

All offenses in the sentencing guidelines have been classified by Crime Group and according to offense seriousness. Gradation of offense seriousness is designated by assignment of a Crime Class for each offense. All offenses in each Crime Class have the same guideline grid. There are nine grids from which the appropriate minimum sentence guideline range will be determined based on the grid cell at which the Offense Variable Level and the Prior Record Variable Levels intersect.

The nine Crime Classes are:

- **Murder II** — Punishment is life or any term of years.
- **Class A Crimes** — Crimes for which a sentence of up to life imprisonment may be appropriate.
- **Class B Crimes** — Crimes for which a sentence of up to twenty (20) years imprisonment may be appropriate.
- **Class C Crimes** — Crimes for which a sentence of up to fifteen (15) years imprisonment may be appropriate.
- **Class D Crimes** — Crimes for which a sentence of up to ten (10) years imprisonment may be appropriate.
- **Class E Crimes** — Crimes for which a sentence of up to five (5) years imprisonment may be appropriate.
- **Class F Crimes** — Crimes for which a sentence of up to four (4) years imprisonment may be appropriate.
- **Class G Crimes** — Crimes for which a sentence of up to two (2) years imprisonment may be appropriate.
- **Class H Crimes** — Crimes for which jail or other intermediate sanctions may be appropriate.

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In most instances crimes have been classified based on the statutory maximum. There are crimes however that have statutory maximums that are either above or below the description give above. (i.e., Uttering and Publishing (14 year stat max) is a class E offense; Delivery of between 5 - 45 kilograms of marihuana (7 year) is a Class D offense).

If the word "Variable" appears in the column marked Crime Class, determine the offense class, offense variable level, and prior record variable level based on the underlying offense.

Attempts to Commit Crimes

The sentence range for a conviction of an attempt to commit an offense when no express provision is made by law for the punishment will be determined in the following manner:

Attempted A, B, C or D offenses: Score all appropriate Offense and Prior Record Variables for the underlying completed offense and use the "E" grid to determine the appropriate sentence range.

Attempted E, F or G offenses: Score all appropriate Offense and Prior Record Variables for the underlying offense and use the "H" grid to determine the appropriate sentence range.

Attempted H offenses: Attempted "H" offenses are to be sentenced to intermediate sanctions as defined in MCL 769.31(4)(c).

Offenses With Variable Statutory Maximums

The sentence range for a conviction for an offense for which the statutory maximum varies and depends on the underlying substantive offense (i.e., conspiracy, allowing a prisoner to escape, inducing a minor to commit a felony) is determined by the Crime Class of the substantive offense. These offenses are identified on the Crime Lists with the Crime Class as "SPEC" and the Statutory Maximum as "Variable".

2. Habitual Offender Sentencing

The appropriate sentence ranges for habitual offender sentence enhancement have been determined by increasing the upper limit of the appropriate cell as follows:

2nd Offense Habitual Offender - Increase Upper Limit by 25%
3rd Offense Habitual Offender - Increase Upper Limit by 50%
4th or Subsequent Offense Habitual Offender - Increase Upper Limit by 100%

If the sentencing judge determines to impose an enhanced sentence, the appropriate sentence range will be found on the grids located behind the Sentencing Grid tab. Each Crime Class has two grids; one for the substantive offenses and another for use when the court determines to impose an enhanced sentence pursuant to the habitual offender statutes.

3. Controlled Substance Sentence Enhancements

If the offender is subject to discretionary sentence enhancement on the basis of a prior Controlled Substances conviction (MCL 333.7413 et seq.), the Offense and Prior Record Variable Levels and Crime Class should be determined for the substantive offense of conviction. The guideline sentence range will be determined by the Grid for the substantive offense of conviction.

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Step V: Determine Proper Sentence Range

After scoring the appropriate Offense and Prior Record Variables, the minimum sentence guideline range for the offense being scored may be determined by examining the intersection of the Offense Variable and Prior Record Variable Levels on the appropriate grid. The guideline sentence range will be contained in the grid-cell (in months or LIFE) where the variable levels intersect.

Prison Cell: A minimum sentence within the cell is an appropriate sentence in any cell in which the minimum of the cell range is more than 12 months.

Straddle Cell: A minimum prison sentence within the cell OR an intermediate sanction which may include a jail term of not more than 12 months, is an appropriate sentence in any cell in which the maximum of the range exceeds 18 months and the minimum of the range is 12 months or less.

Intermediate Sanction Cell: An intermediate sanction sentence which may include a jail term of 0 - 12 months or the cell maximum, whichever is less, is an appropriate sentence in any cell in which the upper limit of the range is 18 months or less.

Additional Statutorily Appropriate Sentences

1. Where the guideline's range will violate the statutorily mandated minimum sentence, the sentencing judge should sentence according to the statutorily mandated minimum sentence.

2. Where the guideline's range will violate the 2/3rds rule, the sentencing judge should not impose a minimum sentence that is more than 2/3rds of the statutory maximum

3. Where the recommended minimum sentence falls in an intermediate sanction cell, the sentencing judge can sentence the offender below the cell range.

4. Where the recommended minimum sentence falls in a straddle cell, the judge can sentence the offender below the cell range.

5. The judge must sentence the offender to lifetime probation if the offense being scored is MCL 333.7401(2)(a)(iv) - Unlawful Manufacture, Delivery, or Possession With the Intent to Manufacture or Deliver a Controlled Substance in an Amount Less than 50 Grams OR MCL 333.7403 (2) (a) (iv) - Unlawful Possession of a Controlled Substance in an Amount of 25 grams or more but less than 50 grams, AND the appropriate cell is an intermediate sanction cell.

6. If a statute mandates a minimum sentence for an individual and the statute authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure from the guidelines. Examples include: MCL 333.7401(2)(a)(iii) - Unlawful Manufacture, Delivery, or Possession with the Intent to Manufacture or Deliver a Controlled Substance in an Amount of 50 Grams or more but less than 225 Grams, MCL 333.7403(2)(a)(iii) - Unlawful Possession of a Controlled Substance in an Amount of 50 Grams or more but less than 225 Grams, and any offense that is part of the Michigan Vehicle Code, 1949 PA 3000, MCL 257.1 to 257.923

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STEP VI: Departure Requirements (If Applicable)

MCL 769.34(3)(a) and (b) allow a judge to depart from the guideline sentence range only where there are "substantial and compelling" reasons to do so.

The judge shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

Furthermore, a departure shall not be based on an offense or offender characteristic already taken into account in determining the appropriate sentence range, unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

A departure from the appropriate sentence range occurs when:

Prison Cell: A minimum sentence outside the cell is a departure, unless required by a statutory mandatory minimum or the 2/3rds rule.

Straddle Cell: A prison sentence outside the cell is a departure unless required by a statutory mandatory minimum or the 2/3rds rule.

Intermediate Sanction Cell: Any prison sentence OR a jail sentence above the cell is a departure unless required by a statutory mandatory minimum.

If the judge imposes a minimum sentence that is longer or more severe than the appropriate sentence range, the court shall:

1. State on the record the reasons for departure.

2. Advise the defendant on the record and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.

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DEFINITIONS

Definitions

This list is not meant to be exhaustive. Each Prior Record and or Offense Variable may have definitions and instructions that are unique to that variable

Adjudication: An adjudication is a finding of responsibility in a juvenile matter. An adjudication includes an adjudication set aside under MCL 712.18e or which has been expunged.

Aircraft: The term as defined in Section 4 of the aeronautics code of the State of Michigan, 1945 PA 327, MCL 259.4.

Cell: The intersection of the offense level and prior record level in a grid.

Prison Cell: Any cell in which the minimum of the cell range is more than 12 months.

Intermediate Sanction Cell: Any cell in which the upper limit of the range is 18 months or less.

Straddle Cell: Any cell in which the maximum of the range exceeds 18 months and the minimum of the range is 12 months or less.

Conviction: A "conviction" is an adjudication of guilt in a criminal matter. A conviction includes assignment to MCL 762.11 (HYTA) and convictions set aside under MCL 780.621 - 780.624 (expunged).

Prior Conviction: A conviction that occurred prior to the commission of the offense being scored.

Concurrent Conviction: A conviction that arises out of the same set of activities as the offense being scored.

Subsequent Conviction: A conviction that occurred after the commission of the scored offense and is unrelated to the activities that lead to the instant offense.

Crime Group: Every felony offense in Michigan is categorized in the guidelines as belonging to one of six particular crime groups. The crime groups are: **Crimes Against a Person, Crimes Against Property, Crimes Involving a Controlled Substance, Crimes Against Public Order, Crimes Against Public Safety, and Crimes Against Public Trust.**

Crime Class: Every felony offense in Michigan is categorized in the guidelines as belonging to one of nine crime classes. The classes are designated dependant on crime type and seriousness. The crime classes are: **Murder II, Class A, Class B, Class C, Class D, Class E, Class F, Class G, and Class H.**

Departure: A departure is defined by statute as a sentence imposed that is not within the appropriate minimum sentence range established under the sentencing guidelines. The appropriate minimum sentence range will sometimes be outside the indicated cell range.

There are four statutorily correct or appropriate sentences outside of specific cell length that are not departures. They are: 1) when a mandatory minimum sentence is required, 2) when the cell exceeds the 2/3rds limitation, 3) when a jail sentence is below a cell range in an intermediate sanction cell, and 4) when a jail sentence is below a cell range in a straddle cell.

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Felony: A "felony" means a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year, or an offense expressly designated by law to be a felony.

Convictions from states other than Michigan or the federal government are to be considered felony convictions if the offense was punishable by more than one year of incarceration or, when the statutory penalty is not available, if the crime was designated as a felony in the convicting jurisdiction at the time of the prior conviction.

Grid: Each grid provides a recommended minimum sentence range for combinations of the offense and prior record levels for each crime classification. There are separate grids for habitual offender sentence enhancement that may be used by the sentencing judge.

Guideline Sentence Range: The set of numbers (in months or LIFE) in each cell from which the judge is required to impose a minimum sentence, absent a departure or other statutorily required sentence.

Homicide: any crime in which the death of a human being is an element of that crime (MCL 777.1(c)).

Intermediate Sanction: Any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of the following:

1) Inpatient or outpatient drug treatment
2) Probation with any probation conditions required or authorized by law
3) Residential probation
4) Probation with jail
5) Probation with special alternative incarceration
6) Mental health treatment
7) Mental health or substance abuse counseling
8) Jail
9) Jail with work or school release
10) Jail, with or without authorization for day parole
11) Participation in a community corrections program
12) Community service
13) Payment of a fine
14) House arrest
15) Electronic monitoring

Juvenile: A person over whom the Juvenile Division of the Probate Court or the Family Division of the Circuit Court has or had jurisdiction at the time of adjudication.

Misdemeanor: A "misdemeanor" means a violation of a penal law of this state which is not a felony, or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or by a fine that is not a civil fine.

Convictions from states other than Michigan or the federal government are to be considered misdemeanor convictions if the offense was punishable by one year or less of incarceration or, when the statutory penalty is not available, if the crime was designated as a misdemeanor in the convicting jurisdiction at the time of the prior conviction.

Off the Road Vehicle (ORV): Term as defined in Section 81101 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.81101.

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Offense Variable (OV): The factors that are used to evaluate the seriousness of the offense and to determine the offender's Offense Variable score.

Offense Variable Score: The sum total of the points scored in each of the Offense Variables applicable to the offense of conviction.

Offense Variable Level (OV Level): Each grid has OV Levels along its vertical axis which are denoted by Roman numeral. The level of seriousness, and hence the guideline range, for the offense being scored increases from I to III through VI.

Prior Felony Conviction: A conviction for a felony under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed.

Prior Felony Juvenile Adjudication: A juvenile adjudication for conduct that if committed by an adult would be a felony under a law of this state, a political subdivision of this state, another state, a political subdivision another state, or the United States if the conviction was entered before the sentencing offense was committed.

Prior Misdemeanor Conviction: A conviction for a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed.

Prior Misdemeanor Juvenile Adjudication: A juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision another state, or the United States if the conviction was entered before the sentencing offense was committed.

Prior Record Variable (PRV): The factors that are used to evaluate the offender's criminal history and to determine the offender's Prior Record Level.

Prior Record Score: The sum total of the points scored in each of the Prior Record Variables for the offense being scored. The Prior Record Score determines the offender's Prior Record Level.

Prior Record Level: Each grid has six (6) PRV Levels along its horizontal axis denoted by the letters "A" through "F". The guideline range for the offense being scored increases from PRV Levels "A" to "F".

Snowmobile: The term as defined in Section 82101 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.82101.

Truth In Sentencing (TIS): A designation of those felony offenses which are subject to disciplinary time if committed on or after 12-15-98. Persons convicted of TIS offenses committed on or after 12-15-98 do not earn disciplinary credits and must serve at least the complete minimum sentence imposed by the court in a secure facility before becoming eligible for parole, with the exception of a few offenses for which there is SAI eligibility. Prisoners subject to TIS will be assessed "disciplinary time" for institutional misconduct which is not added directly to the minimum sentence, but is submitted to the parole board for its consideration in granting or denying parole.

TIS is extended to all felony offenses committed on or after 12-15-2000.

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Vehicle. The term as defined in section 79 of the Michigan Vehicle Code, 1949 PA 300, MCL 257.49

Vessel. The term as defined in Section 80104 if the Natural Resource and Environmental Protection Act, 1994 PA 451, MCL 324.80104

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CRIMES AGAINST A PERSON

PRV #	Points	Variable Name and Category	Instructions
1		**PRIOR HIGH SEVERITY FELONY CONVICTIONS**	1. "Prior high severity felony conviction" means a conviction for a crime listed in offense class M2, A, B, C, or D or for a felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D, if the conviction was entered before the sentencing offense was committed.
	75	The offender has 3 or more prior high severity convictions	
	50	The offender has 2 prior high severity convictions	
	25	The offender has 1 prior high severity conviction	
	0	The offender has no prior high severity convictions	
2		**PRIOR LOW SEVERITY FELONY CONVICTIONS**	1. "Prior low severity felony conviction" means a conviction for a crime listed in offense class E, F, G, or H, or for a felony under a law of the United States or another state corresponding to a crime listed in offense class E, F, G, or H, if the conviction was entered before the sentencing offense was committed.
	30	The offender has 4 or more prior low severity convictions	
	20	The offender has 3 prior low severity convictions	
	10	The offender has 2 prior low severity convictions	
	5	The offender has 1 prior low severity conviction	
	0	The offender has no prior low severity convictions	
3		**PRIOR HIGH SEVERITY JUVENILE ADJUDICATIONS**	1. "Prior high severity juvenile adjudication" means a juvenile adjudication for conduct that would be a crime listed in offense class M2, A, B, C, or D if committed by an adult or for conduct that would be a felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D if committed by an adult, if the order of disposition was entered before the sentencing offense was committed.
	50	The offender has 3 or more prior high severity juvenile adjudications	
	25	The offender has 2 prior high severity juvenile adjudications	
	10	The offender has 1 prior high severity juvenile adjudication	
	0	The offender has no prior high severity juvenile adjudications	

PRV #	Points	Variable Name and Category	Instructions
4		**PRIOR LOW SEVERITY JUVENILE ADJUDICATIONS**	1. "Prior low severity juvenile adjudication" means a juvenile adjudication for conduct that would be a crime listed in offense class E, F, G, or H, if committed by an adult or for conduct that would be a felony under a law of the United States or another state corresponding to a crime listed in offense class E, F, G, or H if committed by an adult, if the order of disposition was entered before the sentencing offense was committed.
	20	The offender has 6 or more prior low severity juvenile adjudications	
	15	The offender has 5 prior low severity juvenile adjudications	
	10	The offender has 3 or 4 prior low severity Juvenile adjudications	
	5	The offender has 2 prior low severity juvenile adjudications	
	2	The offender has 1 prior low severity juvenile adjudication	
	0	The offender has no prior low severity juvenile adjudications	
5		**PRIOR MISDEMEANOR CONVICTIONS OR PRIOR MISDEMEANOR JUVENILE ADJUDICATIONS**	1. Count a prior misdemeanor conviction or prior juvenile adjudication only if it is an offense against a person or property, a controlled substance offense, or a weapon offense. 2. Count all prior misdemeanor and prior misdemeanor adjudications for operating or attempting to operate a vehicle, vessel, ORV, snowmobile, aircraft or locomotive while under the influence of, or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance. 3. Do not count a prior conviction used to enhance the sentencing offense to a felony. 4. Prior misdemeanor conviction" means a conviction for a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed. 5. "Prior misdemeanor juvenile adjudication" means a juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the order of disposition was entered before the sentencing offense was committed.
	20	The offender has 7 or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications	
	15	The offender has 5 or 6 prior misdemeanor convictions or prior misdemeanor juvenile adjudications	
	10	The offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications	
	5	The offender has 2 prior misdemeanor convictions or prior juvenile adjudications	
	2	The offender has 1 prior misdemeanor conviction or prior juvenile adjudication	
	0	The offender has no prior misdemeanor convictions or prior juvenile adjudications	

PRV #	Points	Variable Name and Category	Instructions
6		**RELATIONSHIP TO THE CRIMINAL JUSTICE SYSTEM**	1. Score the appropriate point value if the offender is involved with the criminal justice system in another state or United States. 2. "Prisoner of the department of corrections or serving a sentence in jail" includes an individual who is an escapee. 3. "Delayed sentence status" includes, but is not limited to, those sentenced under: • MCL 333.7411 (Controlled Substance) • MCL 750.350a (Parental Kidnapping) • MCL 762.11- 15 (Youthful Trainee Act) • MCL 769.4a (Assault)
	20	The offender is a prisoner of the department of corrections or serving a sentence in jail	
	15	The offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation	
	10	The offender is on parole, probation or delayed sentence status or on bond awaiting adjudication or sentencing for a felony	
	5	The offender is on probation or delayed sentence status, or on bond awaiting adjudication or sentence for a misdemeanor	
	0	The offender has no relationship to the criminal justice system	
7		**SUBSEQUENT OR CONCURRENT FELONY CONVICTIONS**	1. Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed. 2. Do not score a felony firearm conviction in this variable. 3. Do not score a concurrent felony conviction if a mandatory consecutive sentence will result from that conviction.
	20	The offender has 2 or more subsequent or concurrent convictions	
	10	The offender has 1 subsequent or concurrent convictions	
	0	The offender has no subsequent or concurrent convictions	

OFFENSE VARIABLES FOR CRIMES AGAINST A PERSON

OV#	Pts	Variable Name and Category	Instructions
1		**Aggravated Use of A Weapon**	1. Count each person who was placed in danger of injury or loss of life as a victim. 2. In multiple offender cases, if 1 offender is assessed points for the presence, or use of a weapon, all offenders shall be assessed the same number of points. 3. Score "5" points if an offender used an object to suggest the presence of a weapon. 4. Do not score 5 points if the conviction offense is Felonious Assault or Robbery Armed.
	25	A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon	
	15	A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon	
	10	The victim was touched by any other type of weapon	
	5	A weapon was displayed or implied	
	0	No aggravated use of a weapon occurred	
2		**Lethal Potential of the Weapon Possessed**	1. In multiple offender cases, if 1 offender is assessed points for possessing a weapon, all offenders shall be assessed the same number of points. 2. "Fully automatic weapon" means a firearm employing gas pressure or force of recoil or other means to eject an empty cartridge from the firearm after a shot, and to load and fire the next cartridge from the magazine, without renewed pressure on the trigger for each successive shot. 3. "Pistol", "rifle", or "shotgun" includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle. 4. "Incendiary device" includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail or other similar device.
	15	The offender possessed an incendiary device or explosive device, or a fully automatic weapon	
	10	The offender possessed a short-barreled rifle or a short- barreled shotgun	
	5	The offender possessed a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon	
	1	The offender possessed any other potentially lethal weapon	
	0	The offender possessed no weapon	

OV#	Pts	Variable Name and Category	Instructions
3		**Physical Injury to a Victim**	1. In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.
	100	A victim was killed	2. Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense. Homicide is defined as any crime in which the death of a human being is an element of that crime.
	35	A victim was killed	3. Score 35 points if death results from the commission of a crime and the elements of the offense or attempted offense involve the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive under the influence or while impaired causing death.
	25	Life threatening or permanent incapacitating injury occurred to a victim	4. Do not score 5 points if bodily injury is an element of the sentencing offense.
	10	Bodily injury requiring medical treatment occurred to a victim	5. " Requiring medical treatment" refers to the necessity for treatment and not the victim's success in obtaining treatment.
	5	Bodily injury not requiring medical treatment occurred to a victim	
	0	No physical injury occurred to a victim	
4		**Psychological Injury to a Victim**	1. Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.
	10	Serious psychological injury to victim requiring professional treatment occurred to a victim	
	0	No serious psychological injury requiring professional treatment occurred to a victim	
5		**Psychological Injury to a Member of a Victim's Family**	1. This variable is only scored when the conviction offense is Homicide, Attempted Homicide or Assault with Intent to Commit Murder. Homicide is defined as any crime in which the death of a human being is an element of that crime.
	15	Serious psychological injury requiring professional treatment occurred to a victim's family	2. Score 15 points if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.
	0	No serious psychological injury requiring professional treatment occurred to a victim's family	

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OV#	Pts	Variable Name and Category	Instructions
6		**Intent to Kill or Injure Another Individual**	1. This variable is only scored when the conviction offense is Homicide, Attempted Homicide or Assault with Intent to Commit Murder. Homicide is defined as any crime in which the death of a human being is an element of that crime.
	50	The offender had premeditated intent to kill or the killing was committed while committing or attempting to commit arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer	2. The sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury.
	25	The offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result	3. Score 10 points if a killing is intentional within the definition of second degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent.
	10	The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life	
	0	The offender had no intent to kill or injure	
7		**Aggravated Physical Abuse**	1. "Terrorism" means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.
	50	A victim was treated with terrorism, sadism, torture, or excessive brutality	2. "Sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.
	0	No victim was treated with terrorism, sadism, torture or excessive brutality	
8		**Victim Asportation or Captivity**	1. Count each person who was placed in danger of injury or loss of life as a victim.
	15	The victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense	2. Score 0 points if the sentencing offense is kidnapping.
	0	No victim was asported or held captive	

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OV#	Pts	Variable Name and Category	Instructions
9		**Number of Victims**	1. Score 100 points only in homicide cases. Homicide is defined as any crime in which the death of a human being is an element of that crime.
	100	Multiple deaths occurred	
	25	There were 10 or more victims	2. Count each person who was placed in danger of injury or loss of life as a victim.
	10	There were 2 - 9 victims	
	0	There were fewer than 2 victims	
10		**Exploitation of a Vulnerable Victim**	1. The mere existence of one or more of these factors does not automatically equate with victim vulnerability.
	15	Predatory Conduct was involved	2. "Predatory conduct" means pre-offense conduct directed at a victim for the primary purpose of victimization.
	10	The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status.	3. "Exploit" means to manipulate a victim for selfish or unethical purposes.
	5	The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep or unconscious.	4. "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.
	0	The offender did not exploit a victim's vulnerability.	5. "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.
11		**Criminal Sexual Penetration**	1. Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.
	50	Two or more criminal sexual penetrations occurred	2. Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.
	25	One criminal sexual penetration occurred	3. Do not score points for the 1 penetration that forms the basis of a first or third degree criminal sexual conduct offense.
	0	No criminal sexual penetrations occurred	

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OV#	Pts	Variable Name and Category	Instructions
12		**Contemporaneous Felonious Criminal Acts**	1. A felonious criminal act is contemporaneous if both of the following circumstances exist: (1) the act occurred within 24 hours of the sentencing offense, and, (2) the act has not and will not result in a separate conviction.
	25	Three or more contemporaneous felonious criminal acts involving crimes against a person were committed	2. A felony firearm conviction should not be considered when scoring this variable.
	10	Two contemporaneous felonious criminal acts involving crimes against a person were committed	3. Do not score conduct scored in offense variable 11.
	10	Three or more contemporaneous felonious criminal acts involving other crimes were committed	
	5	One contemporaneous felonious criminal act involving a crime against a person was committed	
	5	Two contemporaneous felonious criminal acts involving other crimes were committed	
	1	One contemporaneous felonious criminal act involving any other crimes was committed	
	0	No contemporaneous felonious criminal acts were committed	
13		**Continuing Pattern of Criminal Behavior**	1. For determining the appropriate points under this variable, all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.
	50	The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age.	2. The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense.
	25	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.	3. Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12.
	10	The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property.	4. Score 50 points only if the sentencing offense is first degree criminal sexual conduct.
	10	The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group.	
	5	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property.	
	0	No pattern of felonious criminal activity existed.	

Effective date 10-1-2000

OV#	Pts	Variable Name and Category	Instructions
14		**Offenders Role**	1. The entire criminal transaction should be considered when scoring this variable.
	10	The offender was a leader in a multiple offender situation	2. If 3 or more offenders were involved, more than 1 offender may be determined to have been a leader.
	0	The offender was not a leader in a multiple offender situation	
16		**Property Obtained, Damaged, Lost or Destroyed**	1. This variable is scored in the Crimes Against a Person crime group only if the offense being scored is Home Invasion First or Second.
	10	Wanton or malicious damage occurred beyond that necessary to commit the crime for which the offender is not charged and will not be charged	2. In multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of money or property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement.
	10	The property had a value of more than $20,000.00 or had significant historical, social, or sentimental value	3. In cases in which the property was obtained unlawfully, lost to the lawful owner, or destroyed, use the value of the property in scoring this variable. If the property was damaged, use the monetary amount appropriate to restore the property to pre-offense condition in scoring this variable.
	5	The property had a value of $1,000.00 or more but not more than $20,000.00	4. The amount of money or property involved in admitted but uncharged offenses or in charges that have been dismissed under a plea agreement may be considered.
	1	The property had a value of $200.00 or more but not more than $1000.00	
	0	No property was obtained, damaged, lost or destroyed or the property had a value of less $200.00	
17		**Degree of Negligence Exhibited**	1. Score OV 17 if an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.
	10	The offender showed a wanton or reckless disregard for the life or property of another person	2. Do not score 10 points if points are given in offense variable 6.
	5	The offender failed to show the degree of care that a person of ordinary prudence in a similar situation would have shown	
	0	The offender was not negligent	

OV#	Pts	Variable Name and Category	Instructions
18		**Operator Ability Affected by Alcohol or Drugs**	1. Score OV 18 if an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.
	20	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.20 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine	2. "Any bodily alcohol content" means either of the following: 1) an alcohol content of not less than 0.02 grams or more than 0.07 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or 2) any presence of alcohol within a individual's body resulting from the consumption of intoxicating liquor other than consumption of intoxicating liquor as part of a generally recognized religious service or ceremony.
	15	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.15 grams or more but less than 0.20 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine	
	10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was under the influence of intoxicating liquor or a controlled substance or a combination of intoxicating liquor and a controlled substance	
	5	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.07 grams or more but less than 0.10 grams of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was visibly impaired by the use of intoxication liquor or a controlled substance, or a combination of intoxication liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content	
	0	The offender's ability to operate a vehicle was not affected by an intoxicating liquor or a controlled substance or a combination of intoxicating liquor and a controlled substance.	

OV#	Pts	Variable Name and Category	Instructions
19		**Threat to the Security of a Penal Institution or Court or Interference with the Administration of Justice**	
	25	The offender by his or her conduct threatened the security of a penal institution or court	
	15	The offender used force or the threat of force against another person or the property of another person to interfere with or attempt to interfere with the administration of justice	
	10	The offender otherwise interfered with or attempted to interfere with the administration of justice	
	0	The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice	

GRIDS

CLASS C OFFENSES

Note: Minimum sentence not to exceed 2/3rds of the statutory maximum

PRV LEVEL

OV LEVEL	A 0 Points	B 1 - 9 Points	C 10 - 24 Points	D 25 - 49 Points	E 50 - 74 Points	F 75+ Points
I 0-9 Points	0 - 11*	0 - 17*	10 - 19	12 - 24	19 - 38	29 - 57
II 10-24 Points	0 - 17*	5 - 17*	12 - 24	19 - 38	29 - 57	36 - 71
III 25-34 Points	10 - 19	12 - 24	19 - 38	29 - 57	36 - 71	43 - 86
IV 35-49 Points	12 - 24	19 - 38	29 - 57	36 - 71	43 - 86	50 - 100
V 50-74 Points	19 - 38	29 - 57	36 - 71	43 - 86	50 - 100	58 - 114
VI 75+ Points	29 - 57	36 - 71	43 - 86	50 - 100	58 - 114	62 - 114

October, 1999 — Asterisked cells are Intermediate Sanction cells, Shaded cells are Straddle cells, Unmarked cells are Prison cells

BEST AVAILABLE COPY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN

vs. File Nos. 00-019193-FH
01-020597-FH

ANTONIO D. HALBERT,

Defendant.
_____/

SENTENCE

BEFORE THE HONORABLE ROBERT L. KACZMAREK, CIRCUIT JUDGE

Saginaw, Michigan - December 10, 2001

APPEARANCES:

For the People: BERNARD J. COPPOLINO (P33577)
ASSISTANT PROSECUTING ATTORNEY
111 S. Michigan Avenue
Saginaw, MI 48602-2019
(989) 790-5330

For Defendant: RODNEY J. O'FARRELL (P24899)
Attorney at Law
1609 Court Street
Saginaw MI 48602-4070
(989) 792-9767

Reported by: Tracy M. Stemler, CSR-4023
Official Court Reporter

December 10, 2001

Saginaw, Michigan

THE COURT: Okay. Sir, you were in court back on November 7th of this year at which time you pled guilty to two counts of second degree criminal sexual conduct. Is that correct?

THE DEFENDANT: It was no contest, yes, sir.

THE COURT: Have you had a chance to talk to the Department of Corrections about what happened here?

THE DEFENDANT: Have I had a chance to talk with them?

THE COURT: Did you talk to Miss Hall?

THE DEFENDANT: Yes, sir.

THE COURT: Did you review her report?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything inaccurate in the report?

THE DEFENDANT: No, sir.

THE COURT: Counsel have a chance to review the report?

MR. O'FARRELL: Yes, your Honor. Rod O'Farrell on behalf of Mr. Halbert. I read through it with him the end of last week. It is accurate. We have no additions or corrections.

THE COURT: Anything in addition to the

report?

MR. O'FARRELL: No, your Honor, not at this time.

THE COURT: Mr. Coppolino, anything?

MR. COPPOLINO: Your Honor, it's my understanding that a representative of the victim does wish to address the Court.

THE COURT: Okay.

MR. O'FARRELL: Judge, excuse me. When you said in addition to the report, did you mean -- you weren't talking about allocution, were you?

THE COURT: Yeah, I was.

MR. O'FARRELL: Oh, I'm sorry. Then I would have some remarks, your Honor.

Your Honor, as the Court is aware, there's an issue in this case of consecutive versus concurrent sentencing. The Court has discretion because this second offense occurred while on bond on the first offense.

Mr. Halbert and his wife had retained me in this case. Mr. Halbert had been on tether throughout the great majority of the time period between the first and the second offense. He had been undertaking counseling with Mr. Gonzales from the Department of Mental Health, and we have received positive reports

through that period.

Mr. Halbert recognizes that he has a problem. He has some remarks that he will address to the Court when given the opportunity, but I would ask the Court to sentence him concurrently, your Honor, and I believe that in all the circumstances in this case, that a sentence in the midpoint of the guideline range would be appropriate.

MR. COPPOLINO: Mr. McKinney.

THE VICTIM: Your Honor, my name is Alondo McKinney, parents of Maria McKinney, the victim, and I think he should get -- me, myself, I feel he should get consecutive because you all let him out once and let him go back and do it again. Me, myself, I don't care -- that's my child. It could be any child. You don't let nobody out there touching no 12, 13-year-old kid.

THE COURT: Thank you.

MR. COPPOLINO: Your Honor, for the People, we would also be recommending consecutive sentencing given the nature of these offenses.

THE COURT: Sir, anything you want to add?

THE DEFENDANT: Yes, sir. To your Honor and the people of the court, I, Antonio Halbert, would like to say to the people of the court I have been a moral

person all my life. I've made a mistake. I have to live with it for the rest of my life. To the families that I have done things to that was unmoral, I am sorry for what I have done. I want to be -- I want it to be made known I work and got through school. I would like to still work in society to be the best person I could possibly be. When I get out, I would like to get help, and while incarcerated, I would seek counseling.

I would like the Court to know I am very sorry for what happened, and I'm sorry for this case -- for this case had to be presented before you, your Honor. I am a church-going person. I believe in what's right for all people in the world.

I would like another chance to do right for myself and family. I feel I could show the Court what kind of person I really am, and I have the Lord to thank because, with his help, I can become a better person. I will accept the responsibility for what has happened and accept the punishment by saying to the Court and the families I am sorry.

THE COURT: Okay. In regard to Case Number 0019193, the maximum penalty I'm setting at 15 years, the minimum at 24 months. Consecutive with that on Case Number 0120597, the maximum 15, the minimum at 57 months. These are within the guidelines. Credit for

how many -- 138 days?

MR. O'FARRELL: I believe the one case has --

THE COURT: 164?

MR. O'FARRELL: Yes.

THE COURT: 164 days credit.

MR. COPPOLINO: And that's -- with it being consecutive, then, your Honor, the 164 applies to the first case. Correct?

THE COURT: Correct.

MR. O'FARRELL: Thank you, Judge.

THE COURT: If you wish to appeal either your plea or sentence, I'll give you a form which explains the conditions under which I must appoint an attorney and the conditions under which I may appoint an attorney. The request for the appointment of attorney must be made in writing and sent to the court within 42 days. There's a 60-dollar Victim Rights Fund on each one of them.

THE CLERK: No forensic lab?

THE COURT: I don't believe so.

(Proceedings adjourned.)

STATE OF MICHIGAN)
) SS
COUNTY OF SAGINAW)

I certify that this transcript is a complete, true and correct transcript of the proceedings and testimony taken in this case before the Honorable Robert L. Kaczmarek, Circuit Judge, in Saginaw, Michigan.

Tracy M. Stemler, CSR-4023
Official Court Reporter
111 South Michigan Avenue
Saginaw, MI 48602

3391-01

STATE OF MICHIGAN
IN THE CIRCUIT COURT OF THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. File No. 01-020597-FH-2
File No. 01-019193-FH-2

ANTONIO HALBERT,

Defendant.
_____/

ORDER OF THE COURT

At a session of said Court, held at the Court House in the City of Saginaw, County of Saginaw, and State of Michigan, this 18th day of December 2001;

PRESENT: HONORABLE ROBERT L. KACZMAREK, Circuit Judge

This matter comes before the Court on Defendant's Motion to Withdraw Plea.

The Defendant was sentenced on December 10, 2001. The Defendant's Motion to Withdraw Plea is not timely as it was made after sentencing on December 11, 2001. After reviewing the record, there was no agreement as to if the sentences were to run concurrent or consecutive. The Defendant's proper remedy is to appeal to the Michigan Court of Appeals. Accordingly, Defendant's motion is **DENIED**.

It is so ordered.

ROBERT L. KACZMAREK
Circuit Judge
10th Judicial Circuit

Dated: December 18, 2001

Honorable Robert L. Kaczmarek
Saginaw County Circuit Court Judge
111 S. Michigan Ave.
Saginaw, MI 48602

September 6, 2002

RE: People v Antonio D. Halbert
Case No's: 00-19193-FH & 01-20597-FH-2

Dear Judge Kaczmarek:

I am the above named defendant. I previously attempted to have a lawyer appointed for post-conviction and the request was denied.

Please find herein enclosed a Defendant's Motion for Appointment of Counsel with an included Motion for Evidentiary Hearing/Resentencing.

I present to the court that I may be entitled to appointment of counsel to assist me due to my meeting the criteria of seeking an appeal for misscored guidelines and the sentence imposed by the court would be in excess of properly scored guidelines.

Although I have not had this issue preserved at sentencing, I am seeking to have the issue addressed by the court prior to seeking relief in the Court of Appeals if relief is denied in the trial court.

Please review the enclosed motion and advise me of the Court's decision on my requests as soon as possible so that I may have at least some time of the 12 month period for filing an Application for Leave to Appeal directly to the Michigan Court of Appeals.

In considering my request, please take into account the findings of the US District Court wherein it was stated that the Public Act Codifying the practice of denying appointed counsel to indigents seeking leave to appeal their plea based felony convictions is unconstitutional and Declaratory relief was ordered, **Tesmer** v **Granholm**, 114 F.Supp2d 603 (2000).

It would be greatly appreciated if Your Honor would at this time appoint counsel to assist me in my efforts to have my sentencing guidelines corrected and resentenced or to seek leave to appeal.

Respectfully submitted,

Antonio D Halbert #382400
Antonio D. Halbert, #382400
Defendant in pro per
Muskegon Correctional Facility
2400 S. Sheridan Rd.
Muskegon, MI 49442-6298

cc: Michael D. Thomas
file

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. File No. 00-019193-FH-2
01-020597-FH-2

ANTONIO HALBERT,

Defendant. /

DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL AND REMAND FOR EVIDENTIARY HEARING/RESENTENCING

NOW COMES Defendant, ANTONIO HALBERT, in pro per, and pursuant to MCR 6.429(C) petitions this Court to APPOINT COUNSEL to assist Defendant preserve issues concerning the Presentence Report and Scoring of the Sentencing Guidelines by filing a Motion for an Evidentiary Hearing on Ineffective Assistance of Counsel and/or Motion for Resentencing, and in support hereof states as follows:

1. On November 7, 2001, Defendant pled NO CONTEST on two counts of CSC II arising from two separate transactions as part of a plea agreement which required the prosecutor to dismiss a second and third count of CSC in one of the cases.

2. On December 10, 2001, Defendant appeared in this Court for sentencing at which time consecutive sentences of 24 months to 15 years and 57 months to 15 years (81 months to 30 years) were imposed.

3. On or about December 11, 2001, Defendant filed a handwritten motion to withdraw pleas. Said motion had been prepared by another prisoner without benefit of the trial record and was inaccurate in content and form.

4. On December 21, 2001, this Court issued an Order DENYING appointment of counsel at public expense.

5. On March 18, 2002, this Court issued an order to the clerk to prepare copies of the records and files in the cases and provide them to the Defendant.

6. Defendant, who, according to the record, required special education due to learning disabilities, eventually obtained assistance from a different prisoner who reviewed the documents provided by the clerk in response to the Court's March 18, 2002 Order.

7. It appears that review of the record establishes that Defendant's trial counsel, ROD O'FARRELL (P23539), although retained, was so preoccupied with other matters, e.g. **United States v. Francis Darrell Hayden**, Case No. 99-CR-20011-BC; **People v. Timothy Burch**, Case No. 01-19568-FC, that the time and attention extended to this Defendant's case was so nominal as to be easily seen as ineffective. Attached as Defendant's Exhibits 1, 2, 3, and 4 are copies of four Motions to Adjourn trial counsel filed due to his dedication to other cases he was more interested in litigating.

8. Also attached as Defendant's Exhibits 5 and 6 are copies of the two separate SENTENCING INFORMATION REPORTS with written analysis of errors in the scoring which trial counsel failed to detect and challenge although proper evaluation prior to sentencing would have exposed the errors and resulted in significantly lesser sentences.

9. The Sentencing Information Reports now at issue appear to have been prepared by DEBRA KAY HALL, who, while possibly experienced as a bureaucratic paper pusher, IS NOT AN ATTORNEY and was motivated by subjective personal passions to color Defendant in the most absolutely worst light possible and misapplied various criteria in the scoring of the sentencing guidelines in manners which render the sentences unlawful.

10. Trial counsel's preoccupation with other matters made him inattentive to his responsibilities to Defendant and left Defendant, a mentally impaired person, essentially without representation during plea negotiations and sentencing.

11. In order to obtain relief or alternatively to preserve these issues for appeal, Defendant is required to present the issues to this court for consideration, MCR 6.429(C).

13. Due to only having recently obtained the records and careful review, Defendant has not been able to present these challenges at an earlier time.

14. The time for filing an Application for Leave to Appeal has not expired and this Court has the authority to exercise jurisdiction and APPOINT COUNSEL to assist Defendant to develop and present the issues to the trial court and if necessary to file an Application for Leave to Appeal.

RELIEF

WHEREFORE, Defendant humbly prays this Honorable Court will GRANT his request and APPOINT COUNSEL to assist him seek post-conviction relief of INEFFECTIVE ASSISTANCE of TRIAL COUNSEL and resulting Sentencing errors, or alternatively, REMAND this case for Resentencing under properly scored guidelines with all original parties participating.

Respectfully submitted,

Antonio D. Halbert #382400
Antonio D. Halbert, #382400
Defendant in pro per
Muskegon Correctional Facility
2400 S. Sheridan Rd.
Muskegon, MI 49442-6298

Dated: Sept. , 2002.

Approved, SCAO

STATE OF MICHIGAN COURT OF APPEALS	APPLICATION FOR LEAVE TO APPEAL AFTER SENTENCING ON PLEA OF GUILTY OR NOLO CONTENDERE	10TH CIRCUIT COURT SAGINAW COUNTY CASE NO: 00-19193/01-20597-FH

THE PEOPLE OF THE STATE OF MICHIGAN v

Defendant's name, address, and inmate no.
Antonio Dwayne Halbert, #382400
Muskegon Correctional Facility
2400 S. Sheridan Rd
Muskegon, MI 49442-6298

Using the information from your judgment of sentence form, enter the number of the circuit court, the county, and the case number in the upper right-hand corner. Follow the instructions for each of the items. Print or type all information.

STATEMENT OF DELAY

1. This application is being filed more than 21 days after entry of the judgment of sentence because:
   - [X] I did not know until recently that I could appeal the decision.
   - [ ] I could not afford the postage and copying costs to file this application.
   - [X] I did not know until recently how to appeal the decision.
   - [X] I needed to get help to complete this application.
   - [X] Other: I was awaiting a decision on a motion filed in the trial court. (Explain)

APPLICATION

2. I was found guilty on 11-7-01 (Date) of the crime(s) as stated below:

Count	PLEA G	PLEA NC	CRIME	CHARGE CODE(S) MCL citation/PACC Code
1		XX	2ND DEGREE CSC-U/13	750.520C1A
1		XX	CSC 2ND DEGREE-RELAT	750.520C1B

*Plea: Check "G" for guilty plea; check "NC" for nolo contendere

3. I was sentenced as stated below by Judge ROBERT L. KACZMAREK (Name of judge)

Count	SENTENCE DATE	MINIMUM Years	MINIMUM Mos.	MINIMUM Days	MAXIMUM Years	MAXIMUM Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	JAIL CREDIT Days	OTHER INFORMATION
1	12-10-01		24		15		12-10-01		164	PRIOR TO 01-20597-FH-2
1	12-10-01		57		15		12-10-01		0	CONSECUTIVE TO 00-19193-FH-2

4. [X] I filed with the trial court a request for appointment of an attorney and affidavit of indigency on 12-18-01/9-6-02 (Date)

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continued on page 2

5. STATEMENT OF QUESTIONS INVOLVED

State the issues that you want the Court of Appeals to review, such as how you believe the circuit court erred in accepting your plea or imposing the sentence. If you need more space, attach additional pages.

Defendant-Appellant is requesting the Court of Appeals to review the trial court record for a claim of ineffective assistance of counsel which resulted in Defendant-Appellant receiving sentences which were calculated on erroneously scored sentencing guidelines and much harsher sentences than what should have been considered and/or imposed under the facts and circumstances in this case.

Defendant-Appellant would also ask this court to consider if the sentencing court has a duty to ensure that trial counsel and the prosecutor evaluate the scoring of the sentencing guidelines in order to ensure that where the guidelines have been prepared by a person without legal training, the guidelines have been properly scored.

Finally, trial counsel failed to ensure that Defendant-Appellant understood things properly

6. STATEMENT OF FACTS

Give any facts not stated in items 2, 3, and 4 on page 1 that are relevant to this appeal. You must also state the transcript pages or other parts of the record that support your facts. If you need more space, attach additional pages.

Although Defendant-Appellant was represented by retained counsel, the record will show that counsel was so involved in other cases for other clients that the representation afforded this Defendant-Appellant was perfunctory and superficial. Due to trial counsel's preoccupation with other clients' cases, trial counsel failed to evaluate the sentencing guidelines and allowed improper and unlawful procedures to be employed in dealing with the cases and sentences imposed on Defendant-Appellant. Attached Appendix "G" is a copy of Defendant-Appellant's "Motion for Appointment of Counsel and Remand for Evidentiary Hearing/Resentencing" which has been sent to the trial court but for which no acknowledgment has been provided. This pleading more fully explains these issues. This application is being submitted to avoid expiration of time limits.

continued on page 3

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7. ARGUMENTS

For each issue listed in item 5, on page 2, state the law that supports your position and explain how the law applies to the facts of your case. If you need more space, attach additional pages.

Cuyler v. Sullivan, 446 US 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Perillo v. Johnson, 79 F.3d 441 (5th Cir 1996); US v. Ellison, 798 F.2d 1102 (7th Cir 1986); Blanco v. Singletary, 943 F.2d 1477 (11th Cir 1991), The foregoing cases relate to trial counsel being ineffective because of having other interests which prevented effective advocacy for Defendant-Appellant. Lopez v. Scully, 58 F.3d 38 (2nd Cir 1995); Smith v. Stewart 140 F.3d 1263 (9th Cir 1998); Riascos-Prado v. US, 66 F.3d 30 (2nd Cir 1995), These cases relate to trial counsel's failure to ensure that Defendant-Appellant was treated fairly and lawfully in relation to sentencing. Townsend v. Burke, 334 US 736, 68 S.Ct. 1252 92 L.Ed 1690 (1948); US v. Lewis, 68 F.3d 987 (6th Cir 1995); US v. Tabares, 86 F.3d 326 (3rd Cir 1996); US v. Takai, 941 F.2d 738 (9th Cir 1991); Correll v. Stewart, 137 F.3d 1404

(continued next pag

8. RELIEF REQUESTED

State what you want the Court of Appeals to do.

I pray the Court REMAND this case to the trial court for consideration of the issues presented in his Motion for Appointment of Counsel and Remand for Evidentiary Hearing/Resentencing, or alternatively, that the Court REMAND the case for resentencing under proper procedures as the facts of this case requires.

Date

Signature

PROOF OF SERVICE

I certify on this date a copy of this application and appropriate attachments were served on the prosecutor of

_____ County by ☐ personal service. ☐ mail.

Date

Signature

72b

(9th Cir. 1998), these cases involve the scoring of the sentencing guidelines, inaccurate information used in determining the sentence to be imposed, and the defendant's mental condition.

In addition to the federal caselaws cited above, Defendant-Appellant would request the Court to consider the following relevant state court caselaw:

People v. Najar, 229 Mich App 393 (1998); People v. Love, 144 Mich App 374 (1985); People v. Jackson, 95 Mich App 565 (1980); People v. Hernandez, 443 Mich 1, (1993); People v. Dowdy, 148 Mich 517 (1986); And the following federal and state constitutional rights, U.S. Const. Amends IVX, V, and VI: Mich Const. 1963, Art I, Secs. 17, 20.

As Defendant-Appellant requests appellate review of the performance of his trial counsel for ineffectiveness resulting in serious abuses and procedural errors that deprived him of proper sentencing on each conviction in a fair and lawful manner, and the mental state of Defendant-Appellant was established as having been deficient, the trial court record requires development for preservation.

The trial court has previously denied appointment of counsel for appeal and where the case now requires inquiry into the scoring of the sentencing guidelines and the performance of trial counsel in regards to ensuring Defendant was treated fairly during the sentencing phases of his separate convictions.

Defendant-Appellant also requests this Court to consider that this application for leave to appeal involves consecutive sentences which were computed in tandem and as one at the same time. Thus the sentences should be reviewed for proportionality as set forth in People v. Kent, 194 Mich App 295 (1992); People v. Warner, 190 Mich App 734 (1991).

1

COVER LETTER

February 21, 2003
(Put Today's Date)

Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: People v Antonio Halbert (The name you were convicted under goes here.)
Supreme Court No. _____ (Leave blank – the Clerk will assign a number for you.)
Court of Appeals No. 244756 (Get this number from the Court of Appeals decision.)
Trial Court No. 01-20597/00-19193-FH (Get this number from Court of Appeals brief or Presentence Investigation Report.)

Dear Clerk:

Enclosed please find the original of the pleadings checked below. (Put a check mark by the items you are sending.) I am indigent and can not provide seven copies. Please file them.

- [X] Affidavit of Indigency/Proof of Service
- [X] (Delayed) Pro Per Application for Leave to Appeal
- [X] Court of Appeals Decision (You must enclose a copy of the Court of Appeals decision.)
- [X] Court of Appeals Brief (This is not necessary, but it is a good idea.)
- [ ] Supplemental Court of Appeals Brief (This is not necessary, but it is a good idea.)
- [X] Other TRIAL COURT MOTION FOR APPOINTMENT OF COUNSEL AND REMAND FOR EVIDENTIARY HEARING/RESENTENCING / ORDER DENYING SAME

Thank you.

Sincerely,

Antonio D. Halbert
(Sign here)

Antonio D. Halbert
(Print Name)

382400
(Prisoner Number)

2400 S. Sheridan Rd
(Address)

Muskegon, MI 49442-6298
City, State, Zip Code)

INSTRUCTIONS

1. You will need 2 copies and the original of this letter and the pleadings listed above.
2. Mail the original of this letter and all the pleadings listed above to the Supreme Court Clerk.
3. Mail 1 copy of letter and pleadings to the prosecutor in the county where you were convicted.
4. Keep 1 copy of letter and pleadings for your file.

Copy sent to:

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff–Appellee,
v
Antonio D. Halbert
(Print the name you were convicted under on this line.)
Defendant–Appellant.

Supreme Court No. _____ (Leave blank.)
Court of Appeals No. 244756 (Get this from the Court of Appeals decision or brief.)
Trial Court No. 01-20597/00-19193-FH (Get this number from Court of Appeals brief or Presentence Investigation Report.)

(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL

INSTRUCTIONS: Answer each question. Add more pages if you need more space. You MUST send a copy of the Court of Appeals decision. Your application must be RECEIVED by the Supreme Court no more than 56 days from the date stamped on the Court of Appeals decision.

1. I was found guilty on (date of plea or verdict) November 7, 2001
2. I was convicted of (name of offense(s)) 2nd Degree CSC - U/13 and CSC 2nd Degree - RELAT
3. I had a XX (Mark one.) guilty plea; ___ no contest plea; ___ jury trial; ___ trial by judge.
4. I was sentenced by Judge Robert L. Kaczmarek (name of judge) on December 10, 2001 (date you were sentenced) in the Saginaw (name of county where you were sentenced; for crimes in Detroit, put Recorder's Court) County Circuit Court to 2 (minimum sentence) years ___ months to 15 (maximum sentence) years ___ months, and 4 (minimum sentence) years 9 months to 15 (maximum sentence) years ___ months.

I am in prison at the Muskegon Correctional Facility (name of prison) in Muskegon (city), Michigan.

5. The Court of Appeals affirmed my conviction on January 13, 2003 (date stamped on Court of Appeals decision) in case number 244756 (number on Court of Appeals decision). A copy of that decision is attached.
6. ___ This application is filed on time. (Check here if the Court will receive it within 21 days from the Court of Appeals decision.)

   XX This application is filed late. (Check here if the Court will receive it more than 21 days but within 56 days from the Court of Appeals decision.) It is late because: (Check all the reasons that apply. You can add others.)

   XX I had to find help.
   ___ I could not get postage and supplies to file this application.
   XX I am not experienced or educated in the law.
   ___ I did not receive my decision from my attorney in time.
   XX Other. Explain It took time to obtain legal books.

GROUNDS – ISSUES RAISED IN COURT OF APPEALS

7. I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below.

(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

Antonio D. Halbert, Defendant–Appellant | Court of Appeals No. 244756

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 which starts on page 7.

ISSUE I:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

Defendant-Appellant was denied effective assistance of counsel at sentencing resulting in a sentence which was based upon improperly scored sentencing guidelines and a combined consecutive sentence which exceeded appropriate scores.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

X 1. The issue raises a serious question about the legality of a law passed by the legislature.
X 2. The issue raises a legal principle which is very important to Michigan law.
X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
X 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

The new Michigan Sentencing Guidelines have the force of law and DUE TO MY TRIAL ATTORNEY BEING PREOCCUPIED WITH OTHER CASES THAT WERE MORE IMPORTANT TO HIM AS REFLECTED IN HIS MOTIONS AND LETTERS (included as exhibits to attachments), he failed to conduct adequate review and investigation into the scoring of the guidelines and allowed the scoring of two separate convictions on two separate cases to be scored in a manner that was unlawful and unconstitutional. If my guidelines had been properly scored as required by law, I would have less than half the prison time I was ordered to serve. Please see People v Harmon, 248 MA 522 (2001); Strickland v Washington, 466 US 668 (1984); Glover v US, 531 US 198 (2001), MCL 769.34(2), (10).

(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

Antonio D. Halbert, Defendant–Appellant | Court of Appeals No. 244756

REMEMBER: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 which starts on page 7.

ISSUE II:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

The trial court should ensure that the sentencing guidelines are evaluated for correctness so that the appropriate minimum sentencing range is applied.

B. The Court should review the Court of Appeals decision on this issue because:
(Check all the ones you think apply to this issue, but you must check at least one.)

__ 1. The issue raises a serious question about the legality of a law passed by the legislature.
X 2. The issue raises a legal principle which is very important to Michigan law.
X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
__ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

The Michigan Legislature and Courts have enacted and implemented laws to determine the appropriate sentence for certain offenses are tailored to not only the offense but to the offender as well. However, in my case, the sentencing guidelines were prepared by a person who abandoned the role of a fair and impartial clerk and did further simply calculate the guidelines in a clearly erroneous manner. Specifically, the first conviction was scored as though the second conviction PRECEEDED it and the same was done in reverse for the second conviction. Since the court failed to ensure that the guidelines were appropriately scored, I am entitled to appellate review, Harmon, supra. MCL 769.34(10) ; Glover, supra.

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plsm 6.1.90

(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

Antonio D. Halbert, Defendant–Appellant | Court of Appeals No. 244756

NEW ISSUE I:

A. (State the new issue you want the Court to consider.)

Under the circumstances of my case and the issues being raised, I am entitled to appointment of counsel to assist me in seeking appellate review of the sentences since I am seeking to challenge the scoring of the sentencing guidelines and question the effectiveness of trial counsel.

B. The Court should review this issue because:
(Check all the ones you think apply to your case, but you must check at least one.)

__ 1. The issue raises a serious question about the legality of a law passed by the legislature.
X 2. The issue raises a legal principle which is very important to Michigan law.
X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
__ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think that your choices in B above apply to this issue in your case. List any cases and citations, laws, or court rules, etc. which support your argument. Explain how they apply to this issue. State the facts which support and explain this issue. If these facts were not presented in court, explain why. You can add more pages.)

Although I entered a guilty plea and there was no sentencing agreement(s), I am still entitled to appeal the scoring of the sentencing guidelines. Especially where as here, I did not have effective assistance of counsel in relation to sentencing. My trial counsel did nothing more than go through the motions in a perfunctory manner. The trial court refused to appoint counsel to assist me appeal the scoring of the sentencing guidelines, this is erroneous under People v Najar, 229 MA 393 (1998); People v Bulger, 462 Mich 495, 505 (2000); Tesmer v Granholm, 295 F.3d 536 (6th Cir 2002); MCL 769.34(10).

RELIEF REQUESTED

9. For the above reasons I request that this Court *GRANT* leave to appeal, *APPOINT* a lawyer to represent me, and *GRANT* any other relief it decides I am entitled to receive.

February 21, 2003 (Date) | [Sign Name] (Sign Name)

Antonio D. Halbert (Print Name) | 382400 (Prison Number)

2400 S. Sheridan Rd (Address) | Muskegon, MI 49442-6298 (City, State, Zip Code)

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IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff–Appellee,

v

Antonio D. Halbert
(Print the name you were convicted under on this line.)

Defendant–Appellant.

Supreme Court No. _____
(Leave blank.)

Court of Appeals No. 244756
(Get this from the Court of Appeals decision or brief.)

Trial Court No. 01-20597/00-19193-FH
(Get this number from Court of Appeals brief or Presentence Investigation Report.)

AFFIDAVIT OF INDIGENCY

1. My name is Antonio D. Halbert
2. I am in prison at Muskegon Correctional Fac. (Name of prison) in Muskegon (City), Michigan.
3. My prison number is 382400
4. Income and Assets: (Check the ones which apply to you.)

X My only source of income is from my prison job.

___ I have no income.

X I have no assets (stocks, bonds, property) which can be quickly changed into cash.

X I can not pay the filing fee for the attached application.

I ask this Court to waive the filing fee in this matter.

I declare that the statements above are true to the best of my knowledge, information and belief.

Date: February 21, 2003

[signature]
(Sign here)

Antonio D. Halbert
(Print name)

PROOF OF SERVICE

On February 21, 2003 I mailed by U.S. mail one copy of the documents checked below: (Put a check mark by the ones you mailed.)

X Affidavit of Indigency and Proof of Service

X (Delayed) Pro Per Application for Leave to Appeal with a copy of Court of Appeals Decision

X Court of Appeals Brief

___ Supplemental Court of Appeals Brief

TO: Saginaw (Fill in the county where you were convicted.) County Prosecutor, at

111 South Michigan Ave (Address), Saginaw (City), MI 48602 (Zip Code)

I declare that the statements above are true to the best of my knowledge, information and belief.

Date: February 21, 2003

[signature]
(Sign here)

Antonio D. Halbert
(Print name)

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